Abstract

No. 11760 Publish Abstract Only Agenda 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

MAY TERM, A. D. 1963

43 I.A.2 9

ARTIE V. TIDWELL, Plaintiff-Appellant, vs. R. GLENN SMITH, EDWARD V. PLATT, and THE SISTERS OF THE THIRD ORDER OF ST. FRANCIS, a corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Winnebago County.

WRIGHT -- J.

This action was commenced in the Circuit Court of Winnebago County by plaintiff, Artie V. Tidwell against defendants, R. Glenn Smith, Edward V. Platt, and The Sisters of the Third Order of St. Francis, a corporation, to recover damages for an assault. The original complaint was filed on May 29, 1959, and alleged that the assault occurred May 31, 1957. The defendants filed motions supported by affidavits to dismiss the complaint and cause of action under Section 48 of the Illinois Practice Act. The motions to dismiss

were granted and judgment entered for the defendants.

An appeal was taken to this court, and we filed an opinion on September 2, 1960, stating, in part: "The Court erred in allowing the defendants' motions to dismiss and entering judgment for the defendants, and, accordingly, the judgment is reversed and the cause remanded for further proceedings not inconsistent herewith." Tidwell v. Smith, 27 Ill. App. 2d 63, 169 N. E. 2d 157.

The mandate of this court was issued on October 5, 1960, and filed in the trial court on November 5, 1960. After the mandate was filed, there was no action taken concerning the case and no pleadings were filed until August 27, 1962, on which date the defendants filed a motion to redocket the case for the purpose of filing a motion to dismiss it for want of prosecution.

On August 28, 1962, the plaintiff filed a notice of a motion to redocket the case, together with proof of service. On September 7, 1962, the plaintiff filed his motion to redocket the case. The motion was granted and on the same date the case redocketed and continued for hearing. Thereafter, on September 14, 1962, the defendants filed another motion to dismiss the cause for want of prosecution.

The plaintiff on September 21, 1962, filed a motion to enter an order in compliance with the mandate. Subsequently

on that date, the trial court vacated the order of September 7, 1962, redocketing the case and granted the motion to dismiss the case for want of prosecution and entered judgment for the defendants.

The plaintiff on October 12, 1962, filed a motion to vacate the order of September 21, 1962, vacating the order of September 7, 1962, redocketing the case and granting the motion to dismiss it for want of prosecution and entering judgment for the defendants, and to deny the motions of the defendants to dismiss the complaint and cause of action and to rule the defendants to answer the complaint. Subsequently on November 8, 1962, the trial court vacated the order of September 21, 1962, and granted the motion to dismiss the case for want of prosecution and entered judgment for the defendants. From this judgment, plaintiff appeals.

The plaintiff contends that it was the duty of the trial court to redocket the case upon the mandate being filed in that court and to enter a rule on the defendants to answer, and since this was not done the trial court failed to act in compliance with the opinion and mandate of this court. In support of this contention, the plaintiff cites Berry v. Lewis, 23 Ill. 2d 380, 187 N. E. 2d 688; Ptaszek v. Konczal, 10 Ill. 2d 326, 140 N. E. 2d 725; People ex rel. Bauer v. Henry, 10 Ill. 2d 324, 139 N. E. 2d 737; Roggenbuck v.

Breuhaus, 330 Ill. 294 and Smith v. Dugger, 318 Ill. 215.

An examination of these cases will disclose that they are not in point for the proposition contended for by the plaintiff for the reason that in each of them the mandate of the reviewing court contains specific directions to the lower court. In these cases the reviewing court determined the issues and decided the questions involved upon their merits and reversed the judgments or decrees and remanded the cases with directions to proceed in conformity with the views expressed in the opinion. In such case, there is no power in the court below except to enter a final order or judgment as directed.

We believe that the rule is well stated in Roggenbuck v. Breuhaus, supra., where the court said, "If specific directions are given nothing can be done except carry out those directions. If no specific directions are given it must be determined from the nature of the case what further proceedings will be proper and not inconsistent with the opinion."

In the instant case the original complaint was dismissed by the lower court and judgment entered for defendants, and on appeal this court held that the trial court erred in allowing defendants' motion to dismiss and entering judgment for the defendants and remanded the case for further

proceedings not inconsistent with the opinion. No specific directions were given to the trial court to enter any judgment or decree, and from a reading of the opinion it could readily be determined that it was incumbent on the plaintiff if he wished to continue with the prosecution of his case after the mandate was filed to proceed pursuant to Paragraph 2 of Section 88 of the Civil Practice Act to re-docket the case and have a rule entered on the defendants to answer. It was not the duty of the trial court to take any steps to redocket the case after the mandate was filed. That duty rested with the plaintiff if he wished to pursue the case further.

The mandate was caused to be filed in the trial court by the plaintiff on November 5, 1960, which was within the time prescribed by statute, (Ill. Rev. Stats., 1959, Ch. 110, Sec. 88, Sub-paragraph 3), but there is nothing in the record that discloses the plaintiff took any steps to redocket the case and secure a rule of court for the defendants to answer until almost two years after the mandate had been filed and not until after the defendants had asked for the case to be redocketed and filed their motion to dismiss.

In the absence of any reasons asserted by the plaintiff for such unreasonable delay in the prosecution of his case, we are of the opinion that the trial court correctly dismissed

the case for want of prosecution. To hold otherwise would defeat the purpose of the Civil Practice Act and abrogate the general rule that matters in litigation should be disposed of with dispatch.

The judgment of the Circuit Court is affirmed.

A F F I R M E D.

CROW, P. J. and SPIVEY, J., Concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 18th day of SEPTEMBER A. D. 19 63, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

43 I.A.252

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 18th day of SEPTEMBER A. D. 19 63, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10467 Agenda No. 11

Homer D. McLaren, Plaintiff-Appellee, vs. Jere A. Martin, Defendant-Appellant.	:	Appeal from the Circuit Court of Sangamon County

CARROLL, PRESIDING JUSTICE

This is an action for property damage sustained by plaintiff as the result of a collision between his automobile and that of the defendant. The case was tried without a jury, and resulted in a judgment for the plaintiff in the sum of $170.96. Defendant has appealed.

The grounds upon which defendant contends for reversal are that plaintiff was guilty of contributory negligence as a matter of law, and that the judgment was against the manifest weight of the evidence.

The collision occurred on Jefferson Street in Springfield, Illinois, as plaintiff was turning into a grocery store parking lot driveway. Jefferson is a two way, four lane street, running East and West, with no parking permitted on the North side thereof. Prior

to the accident, defendant was following plaintiff's car, going West.

Plaintiff testified that at about noon, May 19, 1962, he was driving West on Jefferson Street in the outer West bound traffic lane, intending to turn into the Eisner Grocery Store located on the North side of the street; that the center line of Jefferson Street was marked with a continuous white line; that the West bound traffic lanes were divided by a line of dots; that before making the turn into the Eisner driveway he slowed his car to approximately 15 miles per hour; that when 50 or 60 feet East of Eisners he turned on his right turn signal lights; that prior to making the turn the wheels of his car were on the dotted line, he having pulled a little to his left in order to negotiate the sharp turn into the Eisner parking lot; that he first noticed defendant's car at an intersection East of where the collision occurred when both cars stopped for a traffic light; that when he turned on his turn signal, defendant's car was 50 to 60 feet behind him; that when plaintiff's car was struck it was about on the curb line on the North side of Jefferson Street; that the impact moved the car about 6 feet to the West and and North; that when he got out of the car, his turn signals were still operating; and that defendant's car was against the curb on the North side of the pavement. Plaintiff further testified that his car was struck at about the center portion of the right rear fender.

Richard Giacoletto, witness for the plaintiff, who came upon the scene after the accident, testified that plaintiff's car was

"hit in the back and pushed everything forward, the fender and the door".

Herman Miller, defendant's witness, testified he was traveling East on Jefferson at the time of the accident; that plaintiff's car was in the West bound lane next to the center line; that defendant was in the right hand lane, 50 or 60 feet behind it; that both cars stopped before the collision; that plaintiff then turned to the right in front of the defendant, and in so doing, scraped the door and fender of his car.

William Gufforth, an adjuster for Hawkeye Insurance Company which carried the insurance on defendant's car, and his wife, both testified for the defendant. These witnesses were in a car going East and about 3 car lengths behind the witness Miller's car. They stated in substance that after defendant's car stopped, plaintiff, without signaling, turned in front of it. Apparently these witnesses did not stop at the accident scene as they did not testify as to the position of the cars following the collision or the location of the damage to plaintiff's vehicle.

The defendant, Jere A. Martin, who knew more about how the accident happened than any person other than the plaintiff, did not testify.

Where the trial court sits as a trier of the facts, his findings on controverted fact questions are entitled to the same weight as the verdict of a jury. He sees and hears the witnesses testify, and his judgment on all questions of fact is conclusive if

not manifestly contrary to the weight of the evidence. Meyer v. Hendrix 311 Ill. App. 605, 37 NE 2d 445. Shapleigh Hardware Co. v Enterprise Foundry Co. 305 Ill. App. 180,27 NE 2d 1012. Jones v Manufacturer's Cas. Ins. Co. 313 Ill. App. 386, 40 NE 2d 545. Here the evidence as to the manner in which defendant was operating his car, the position of both cars when plaintiff made his turn into the driveway, and whether plaintiff signaled his intention to turn was sharply conflicting. Such fact would not warrant a conclusion by this Court opposite to that reached by the trier of the facts. The trial court necessarily found the plaintiff to be free of contributory negligence and the defendant guilty of the negligence charges as laid in the complaint. We find no reason to disagree with its decision and accordingly the judgment is affirmed.

AFFIRMED

REYNOLDS and ROETH, JJ., concur.

2nd DIVISION

Abstract

No. 11738 Publish Abstract Only Agenda 8

(43 I.A.2 68)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT., SECOND DIVISION

MAY TERM, A. D. 1963

IN THE MATTER OF THE ESTATE OF ISABELLE DUKE, DECEASED.

Walter C. Overbeck,

Appellant,

vs.

Mary Steele, Administrator de bonis non of the Estate of Isabelle Duke, deceased, and Minnie Pearl Steele,

Appellees.

Appeal from the Circuit Court of Marshall County.

WRIGHT -- J.

This is an appeal from an order of the Circuit Court of Marshall County, Illinois, allowing and fixing an attorney fee for plaintiff, Walter C. Overbeck, for representing Walter S. Harrison, Administrator of the Estate of Isabelle Duke, deceased, and Mary Steele, Administrator de bonis non of the Estate of John Steele, deceased.

John Steele, a brother and heir of the decedent, died during the course of administration of the Estate of Isabelle Duke, deceased, and Minnie Steele, as Executor of the Estate of John Steele, deceased, was substituted as a party in the administration proceedings. Minnie Steele, as Executor of the Estate of John Steele, deceased, filed objections to the various reports and final report of the Administrator of the Isabelle Duke Estate, including objections to the attorney fee of the plaintiff. The objections to the attorney fee were overruled by the County Court of Marshall County and the court entered an order fixing the plaintiff's attorney fee at $20,000.00.

An appeal was taken from the order fixing plaintiff's attorney fee in the amount of $20,000.00 to the Circuit Court of Marshall County by Minnie Steele, as Executor of the Estate of John Steele. The matter was referred to a Special Master and after a hearing before the Master, he filed his report in which he recommended that an order be entered by the Circuit Court fixing plaintiff's attorney fee in the amount of $18,500.00, and found that the administrator had paid the plaintiff in advance the sum of $14,075.00.

Objections to the report of the Special Master were filed by the plaintiff, which were later overruled by the Special Master, and on motion of the plaintiff the objections were allowed to stand as objections in the Circuit Court.

The Circuit Court entered an order on October 6, 1962, fixing the attorney fee of the plaintiff at $15,000.00 and found that $10,500.00 had been paid by the administrator on the fee leaving a balance of $4,500.00 due the plaintiff, payable from the assets of the Estate of Isabelle Duke, deceased.

Plaintiff contends that the objections to the claim for attorney fee were withdrawn while the case was pending before the Special Master and, therefore, the question of attorney fee for the plaintiff was moot. The alleged withdrawal of the objections read, in part, as follows:

> "And now comes Minnie Pearl Steele, pro se, and does hereby withdraw any and every objection filed in and to the Amended, Supplemental and Final Report of the administrator herein in and only to the extent that they adversely affect any and all attorney's fees allowed by the final order of the County Court of Marshall County, Illinois, meaning that the order of said Court with respect to attorney's fees allowed to Walter C. Overbeck meets with my approval.
>
> Dated November 15, 1961.
>
> Witness to signature: /s/ Minnie Pearl Steele
> /s/ Walter C. Overbeck"

The objections to the report of the administrator as to the attorney fee fixed and allowed the plaintiff by the County Court were made by Minnie Steele, as Executor of the Estate of John Steele, deceased, and not by her individually. The proceedings to perfect the appeal from the County Court to the

Circuit Court were instituted by her in her representative capacity and not by her individually. The alleged withdrawal of objections to the attorney fee was signed by her individually and witnessed by plaintiff, and was not a withdrawal of the objections which had been filed by Minnie Steele in her representative capacity. Therefore, the question of attorney fees was properly before the Circuit Court and the question was not moot.

The plaintiff further contends that the Special Master and the Circuit Court had no authority to consider the question as to what amounts the administrator had paid to the plaintiff in advance on his attorney fee. In other words, plaintiff contends that the sole question on appeal was the amount and reasonableness of the attorney fee and there could be no consideration of previous payments to him. In Schwartfager v. Schwartfager, 330 Ill. App. 111, 70 N. E. 2d 216 at Page 217, the court said:

> "It has been repeatedly held both by the Supreme and Appellate Courts of this State, that in appeals from the probate court to the circuit court, the hearing is a trial de novo, and the appeal acts to set aside any order that might have been rendered in the probate court. The circuit court does not sit as a court of errors, but should try the case the same as though it had never been tried before, which on further appeal to the Appellate or Supreme Court, the judgment should be reviewed as that of the circuit court and the view of the probate court is of no importance in passing on that judgment."

It is also the rule that in any trial de novo in the Circuit Court, the Circuit Court is limited to the issues tried in the Probate Court, from which the appeal is taken. It cannot extend to other issues not before, or passed upon by the Probate Court wherein the original trial was had. Schultz v. Chicago City Bank and Trust Co., 384 Ill. 148, 51 N. E. 2d 140; Bley v. Luebeck, 377 Ill. 50, 35 N. E. 2d 334. Where there has been an appeal to the Circuit Court as in the instant case from an order of the Probate Court fixing attorney fees, the Circuit Court has the same right and duty to determine attorney fees as does the County Court. In Re Klappa's Estate, 18 Ill. App. 2d 501, 152 N. E. 2d 754; In Re James' Estate, 10 Ill. App. 2d 232, 134 N. E. 2d 638.

We believe that the whole question of attorney fees to be allowed, fixed and paid to the plaintiff for his legal services in representing the administrator and the Administrator de bonis non of the Estate of Isabelle Duke, deceased, was before the Circuit Court and that the Circuit Court in the trial de novo, which was had before it, had the right and duty to not only allow and fix the attorney fee of the plaintiff but also the right to inquire into and receive evidence as to any advance payment made on the fee. The matter of advanced payments alleged to have been made on the attorney fee was not a collateral matter, but was a fact relevant to a determination of the amount of the

attorney fees to be allowed and paid to plaintiff.

Plaintiff also contends that the advanced attorney fees paid to him were for services rendered to the heirs of Isabelle Duke, deceased, individually, including John Steele, and were paid out of rentals received from property of the estate located in Minnesota, and not out of estate assets and that the Circuit Court improperly gave the estate credit for $10,500.00 on the attorney fee. Cancelled checks were offered and admitted in evidence before the Master made payable to Walter C. Overbeck, in amounts exceeding $10,500.00, and all of these checks were signed, Estate of Isabelle Duke, Decd, by Mary Steele, Administrator.

We believe that these checks which were made payable to the plaintiff out of the Estate of Isabelle Duke, deceased, when considered with all of the other evidence adduced at the hearing before the master, was sufficient to support the trial court's finding that $10,500.00 had been paid in advance on plaintiff's attorney fee.

The amount and reasonableness of an attorney's fee is within the sound discretion of the trial court and will not be interfered with on appeal unless there has been a manifest abuse of the trial court's discretion. Lombard v. Witbeck, 173 Ill. 396, 51 N. E. 61.

In order to alter a fee allowance made by a trial court,

a reviewing court is required to find that the determination of the trial court is manifestly or palpably erroneous. Such allowances should not be altered unless there is a plain case of wrongful exercise of judgment by the trial court. In the Matter of the Estate of Anthony Jaysas, 33 Ill. App. 2d 287, 179 N. E. 2d 411.

The trial court having the requisite skill and knowledge to form an opinion as to what is a reasonable fee to be allowed and paid an attorney for representing an administrator, while he should consider the opinions of witnesses as to the fees usually charged and paid for such services, is not bound to accept such opinions as conclusive but may take into consideration his own experience and knowledge of the value of legal services rendered. In Re James' Estate, supra. In Goodwillie v. Millimann, 56 Ill. 523, the court on Page 528 ably stated the rule as follows:

> "In taxing such fees a chancellor should exercise his own judgment, and not be wholly governed by the opinion of attorneys as to the value of the services. He has the requisite skill and knowledge to form some idea as to what is a fair and reasonable compensation, and he should exercise that judgment. He should, no doubt, consider the opinions of witnesses and evidence of the sum usually charged and paid for such services, but should not be wholly controlled by the opinions of attorneys as to their value."

Opinions as to the reasonableness of attorney fees are

receivable in evidence and are entitled to due weight, but our courts are also well qualified to form an independent judgment on such question and it is their duty to do so. McMannony v. Chicago D & V. R. Co., 167 Ill. 497, 47 N. E. 712.

After examining this record, we cannot say that the trial court abused his discretion in fixing plaintiff's attorney fee at $15,000.00 or that his determination of the fee and advanced payment thereon was manifestly or palpably erroneous, and this court can perceive no valid reason or right to overrule the determination made by the trial court.

The order of the Circuit Court of Marshall County is affirmed.

A F F I R M E D.

CROW, P. J. and SPIVEY, J., Concur.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 18th day of SEPTEMBER A. D. 19 63, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10455 . Agenda No. 5

Helen Van Hooser, as Administrator of the Estate of Gerald Van Hooser, Deceased, Plaintiff-Appellee, vs. Scherer Freight Lines, and Daniel H. Pinkham, Defendants-Appellants.	Appeal from the Circuit Court of Christian County

CARROLL, PRESIDING JUSTICE

This is a wrongful death action in which the jury returned a $10,000.00 verdict against both defendants, and on which judgment was entered. Following denial of their post trial motion for judgment notwithstanding the verdict, or in the alternative for a new trial, defendants appealed.

The record shows the injuries resulting in the death of plaintiff's intestate, Gerald Van Hooser, were sustained when the automobile he was driving came into collision with a tractor-trailer truck, owned byScherer Freight Lines, and driven by its employee, Daniel H. Pinkham. The collision occurred on October 9, 1960 at about 11:00 o'clock P.M. near the intersection of Park and Shawnee

streets in Taylorville, Illinois. The weather was clear, visibility good, and the pavement dry. Park Street, which is about 24 feet wide, is a two lane asphalt paved highway, running East and West. Shawnee Street, which runs North and South is about 20 feet in width. The tractor-trailer was proceeding West on Park Street and deceased was driving a 1953 Ford automobile East on the same Street. The point on Park Street where the two vehicles collided, while not fixed with certainty, appears to have been a short distance West of the Park and Shawnee Streets Intersection. At the time of the occurrence, both deceased and Pinkham were alone in their respective vehicles.

Defendants contend the trial court erred in refusing to direct a verdict in their favor because there is no evidence that defendants were guilty of negligence and because plaintiff failed to prove due care on the part of the deceased. Alternatively, it is urged they should have been granted a new trial for the reason that the verdict is contrary to the manifest weight of the evidence, and that the trial court erred in admitting testimony as to the driving habits of the deceased.

Consideration of defendants' contentions involves examination of the evidence adduced on the liability issue. Pinkham was rendered incompetent as a witness by virtue of the Evidence Act and as a result there is a meagerness of evidence as to how the accident actually occurred. James Oseland, witness for the plaintiff, testified that his house was on the South side of Park Street near

Shawnee Street; that at the time of the occurrence he was asleep in a second story bedroom which has two windows facing Park Street; that after being awakened by his wife, he looked out one of the windows and saw defendants' trailer standing on Park Street; that it was approximately in the middle of the road with a portion thereof on both the North and South side of the center of Park Street; that he could then see only the trailer, which was about 40 feet from the corner; that he dressed, came downstairs, and went out of the house; that he then saw both the truck and trailer which had been moved from where he had first seen it to the North side of Park Street and 75 feet West of the Shawnee and Park Street intersection; that the Van Hooser Ford was facing West on the South side of Park Street in the East bound traffic lane; that he did not know where the accident happened, but could only state where he saw the Ford standing. On cross-examination the witness further testified that when he came downstairs he saw the driver get out of the tractor, which was then in front of his house on the North side of the street. Dial Rasor, truck driver for defendant, Scherer Freight Lines, called under Section 60 of the Civil Practice Act, testified that at the time of the occurrence, he was driving one of defendant's tractor-trailer trucks West on Park Street in Taylorville; that after passing Shawnee Street he met the deceased's Ford automobile going East; that it was proceeding on the South side of Park Street at 30 miles per hour; that its head lights were burning on the dim

beam; that when he met the decedent's car, the Pinkham tractor-trailer was following him at a distance of a block or about 300 feet.

Jason Daykin, a witness for plaintiff, testified that during October, 1960, he lived on the Northwest corner of Shawnee and Ash Streets in Taylorville; that Ash is one block North of and parallel with Park Street; that following the accident he went to the scene; that when he arrived, the Van Hooser car was just East of the East curb of the intersection of Shawnee and Park Streets, and on the South side of the center of Park Street; that it was in the East bound lane pointed West; that there were items of debris on the pavement starting just East of the West curb of Shawnee Street and continuing West; that the items included a hub cap, some chrome, part of a door, glass, and pieces of metal, which were all on the South side of the pavement; and that he moved the items from the pavement to the strip between the sidewalk and the curb. This witness further testified the truck was West of the intersection on the North side of the highway.

Two police officers, called by defendants, testified as to the position of the vehicles when they arrived on the scene, which was some time after the accident. According to their testimony, the Van Hooser car was on the right hand side of Park Street in its own traffic lane. A number of photographs of the intersection and the tractor-trailer unit offered by the defendants were admitted in evidence. None of these pictures shed any light on the crucial

question as to what caused the collision. Dial Rasor, when called as a defense witness, stated on direct examination that he recalled driving on Park Street the night of the accident; that he glanced in the mirror and saw the Pinkham trailer, which was about 300 feet behind him; that it was dark; that the lights of the Pinkham trailer were on, and all he could see were its head lights and the marker lights on the cab and the corner of the trailer; that he met the Van Hooser Ford half way between Shawnee and the next street West; that its lights were on; that he noticed nothing unusual about it except that it was a little close to the center line; that as he met the Ford, he glanced in the mirror and saw that the Pinkham vehicle was on its right side; that after he met the Ford, he "noticed that the Ford hit Mr. Pinkham, his unit"; that the Ford had "come over, close to a foot". On cross-examination, this witness stated that he did not see the Van Hooser car after it passed him until it had hit the trailer, and had no knowledge of what it did during such interval.

The question presented by a defendant's motion for a directed verdict is whether there is any evidence when considered together with all reasonable inferences arising therefrom, in its aspect most favorable to plaintiff, fairly tends to prove the necessary elements of plaintiff's case. In deciding such question, the Court does not consider conflicts in the evidence, the weight thereof, or the credibility of the witnesses. These are matters for the jury.

Only where there is a total absence of proof on one or more of the essential elements of plaintiff's case is the trial court warranted in directing a verdict for the defendant. Rohr v Cluver 20 Ill. App. 2d 548, 156 NE 2d 770; Lutz v Chicago Transit Authority, 36 Ill. App. 2d 79, 183 NE 2d 579.

In this case we do not think it can be said that there was a total failure to prove any one of the elements necessary to establish plaintiff's claim. There is evidence that plaintiff's decedent was proceeding in his own traffic lane when he met the Rasor truck, 300 feet West of the scene of the accident; and that after the accident, the Pinkham trailer was in the middle of Park Street, part of it being on the North side, and the balance on the South side of the center of said street. The witness Daykin placed the accident debris in Van Hooser's lane. A number of witnesses testified as to the careful driving habits of the deceased. Such evidence with the reasonable inferences which could be legitimately drawn therefrom tendsto prove the essential elements of plaintiff's case. The credibility of the witnesses testifying to the facts is not involved. In determining whether a plaintiff is entitled to have a case go to the jury, all of the evidence favoring him must be taken to be true, and considered in the light most favorable to him. Busser v Noble 22 Ill. App. 2d 433, 161 NE 2d 150. When so considered it was in this case ample to raise fact questions as to whether defendants were guilty of the negligence charged, and whether decedent was in the exercise of due care for his own safety. In

such situation it became the trial court's duty to submit these questions to the jury.

The theory upon which defendants argue that the verdict is contrary to the manifest weight of the evidence is substantially that the testimony of the defense witness, Rasor, as to how the accident happened is uncontradicted and must be accepted as true. No witness testified as to the course followed by the two vehicles immediately prior to the collision. There was evidence as to where they rested after colliding and it was conflicting. The jury were not bound to accept as true the testimony of any particular witness on any controverted issue but were required to resolve such questions from all the facts and circumstances shown by the evidence including such inferences as might be legitimately drawn therefrom. A jury verdict based on conflicting evidence will not be disturbed as being contrary to the manifest weight of the evidence unless an opposite conclusion is clearly evident. Stone v Guthrie 14 Ill. App. 2d 137, 144 NE 2d 165. Such is not the situation in the instant case.

Defendants' final contention is that Dial Rasor was an eye witness to the accident and consequently the trial court erred in admitting testimony as to the careful driving habits of the deceased. Our courts have uniformly held that where there is an eye witness to an occurrence it is error to admit testimony of habits of due care on the part of the deceased. Petro v Hines 299 Ill. 236 132 NE 462. Plaintiff, in his case in chief, offered no testimony of eye witnesses but called four witnesses who testified to habits of

care and caution on the part of the decedent. Defendants' counsel objected to the testimony of each of such witnesses and moved to strike their testimony, stating to the Court that there were eye witnesses to the accident. The court overruled all of these objections. At the close of plaintiff's case, the court, in chambers, advised defendants' counsel that his motion to strike the habit testimony was being denied because when offered, no eye witnesses had testified. We think the trial court was correct in so ruling. Plaintiff having offered no testimony of eye witnesses, it was not error to admit the testimony of habit witnesses. Moore v B.D. and C.R.R. Co. 295 Ill. 63. If, as defendants now argue, the habit testimony of plaintiff's witnesses was rendered incompetent by the production of the defense witness, Rasor, then it was incumbent upon the defendants to challenge its competency by moving to strike the same and thus eliminating any consideration thereof by the jury. Defendants' counsel made no such motion after Rasor testified. Since the habit testimony was competent when offered, it remained such until the Court ruled otherwise upon an appropriate motion to strike it from the record. It may be further noted from the circumstances surrounding Rasor when he claimed he saw the accident happen, there arises a serious doubt that he qualified as an eye witness. His testimony failed to describe the conduct or behavior of the decedent between the time he met Rasor and the collision. If Rasor could not or did not observe such relative conduct, then he did not qualify as an eye witness. Cleary's Handbook of Illinois Evidence; Lauer v Elgin, J. and E. Ry. Co. 305 Ill. App. 200, 27 NE 2d 315.

Upon a careful review of this record we are of the opinion that it contains no reversible error and accordingly the judgment of the Circuit Court will be affirmed.

AFFIRMED

REYNOLDS and ROETH, JJ., concur.

49115

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,
v.
FRANK NARDONE,
Appellee.

APPEAL FROM
MUNICIPAL COURT
CHICAGO, ILLINOIS.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An information charged the defendant with unlawfully keeping a book in violation of Ill. Rev. Stat. 1959, Chap. 38, §336. The court granted defendant's motion to quash a search warrant and to suppress the evidence seized thereunder. The People appeal from this interlocutory order.

The People insist that the warrant was issued in proper form and that the verified complaint stated facts sufficient to show probable cause for the issuance thereof, citing cases. We do not deem it necessary to discuss the case at length as the defendant has failed to file a brief as required by Rule 7 of this court. See Standley v. Standley, 143 Ill. App. 278 and Barton v. Barton, 318 Ill. App. 68, 70.

The order is reversed and the cause remanded with directions to overrule the motion to quash the search warrant and to suppress the evidence.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and BRYANT, J., concur.

49058

ARTHUR J. MAGEE and EVELYN M. MAGEE,	)	
	)	
Appellants,	)	APPEAL FROM
	)	
v.	)	SUPERIOR COURT,
	)	
MARY M. NOTH,	)	COOK COUNTY.
	)	
Appellee.	)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a partition proceeding. Plaintiffs' appeal presents the principal question whether the chancellor should have ordered payment from the proceeds of sale of "a reasonable fee for plaintiffs' solicitor."

The subject premises consisted of a 2-family dwelling, which was occupied by the families of two sisters, one of whom is a party plaintiff and the other is the defendant. The rights and interests of all parties in interest were properly set forth in the complaint, and partition was the relief sought. An affirmative defense was made that the parties had entered into an oral agreement not to partition the property. Defendant also counterclaimed for alleged repairs.

After the matter was at issue, plaintiffs took a discovery deposition of defendant and then filed a motion for summary judgment for partition and for dismissal of the counterclaim. The motion was predicated on the contention that defendant's deposition, attached to the motion, "proved conclusively that there was never any agreement not to partition and certainly that there was never any agreement not to partition entered into after the parties

secured title." Defendant's counter-affidavits alleged that defendant was confused during the taking of her deposition, and "that the nature of her defense is as follows: (a) that both prior and subsequent to the parties hereto becoming in title to the property in question, she agreed orally with the plaintiff Arthur J. Magee that the property would not be partitioned; * * *."

After considering pleadings, the deposition of defendant, affidavits and counter-affidavits, authorities submitted, and the arguments of counsel, the court found that there was "no genuine issue as to any material fact and that there is no meritorious and substantial defense to plaintiffs' Complaint for Partition and, therefore, the plaintiff is entitled to a Decree of Partition as a matter of law." The court allowed plaintiffs' motion for summary judgment for partition, denied the counterclaim of defendant, and entered a decree for sale.

At a public sale, the property was sold to defendant for $43,000. In a subsequent report of proposed distribution of the proceeds of the sale, the master found that the plaintiffs were entitled to $2500 attorney's fees. After argument, the court sustained defendant's exception to this finding and entered an order that "attorney's fees for the plaintiffs be not apportioned out of the proceeds of the sale." The propriety of this order is the only issue presented for review. All claims for repairs were dismissed by stipulation.

In partition proceedings, the apportionment of solicitor's fees is governed by statute. Section 68 of the Partition Act

(Ill. Rev. Stat., Ch. 106) provides as follows:

> "In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the complaint, the court shall apportion the costs among the parties in interest in the suit, including * * * a reasonable fee for plaintiff's solicitor, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some of them, shall interpose a good and substantial defense to the complaint."

Thus, reasonable solicitor's fees may be apportioned among the parties as costs, where the complaint correctly sets forth the interests of the parties, and where the defendants do not interpose a good and substantial defense.

Plaintiffs contend they are entitled to apportionment of their attorney's fees as costs because, and it is not denied, they properly set forth in their complaint the rights and interests of all the parties, and the decree granting partition specifically found that "there is no meritorious and substantial defense to plaintiffs' Complaint for Partition." We have examined cases cited by plaintiffs in support of this contention. (Hynes v. Jennings, 262 Ill. 268 (1914); McLaughlin v. Hahn, 333 Ill. 83 (1928); Harrison v. Kamp, 403 Ill. 542 (1949).) In substance, they show that the "interposition of a frivolous or vexatious defense will not preclude apportionment of fees, and where defendant unnecessarily employs counsel this will not save him from liability for his share of the fees of plaintiff's solicitor." 29 I.L.P., Partition, §93.

The provisions of the statute for allowance of solicitor's fees are based upon the theory that the plaintiff prosecutes the

suit for the benefit of the co-tenants and, in such case, where the interests are correctly set forth a fee for plaintiff's attorney is allowed "only where it is unnecessary for the defendants, or some of them, to employ counsel to protect their interests in the land. * * * It is essential that the conduct of the solicitor for the parties seeking partition be fair and impartial to all parties in interest. * * * Furthermore, it is settled law that any substantial defense made in good faith, although not sustained in either the trial court or the reviewing court, is sufficient to preclude the apportionment of solicitors' fees. * * * Suffice it to say that the statute makes no distinction between a defense based upon a controverted question of law and one involving a disputed question of fact, and that, in our opinion, a disputed question of law arising on an admitted statement of facts is no less a substantial defense than a disputed question of fact." (Harrison v. Kamp, 403 Ill. 542, 547-8 (1949).) "The particular set of circumstances under which courts will deem it to have been necessary for defendant to employ counsel, numerous cases will attest, is not always clear. * * * If [a] doubt appears reasonable, if there exists between the parties an honest difference of opinion, apportionment of plaintiff's solicitor's fees will not be allowed." O'Malley v. Walker, 4 Ill. App.2d 555, 560, 562 (1955).

In support of the denial of fees, defendant contends that both defendant's answer and her counter-affidavit in opposition to plaintiffs' motion for summary judgment amply demonstrate that,

in the event she were allowed to testify on direct examination, she would be able to prove up a prima facie defense "that is good and substantial to a partition action," i.e., that an oral agreement was entered into between defendant and the plaintiffs, subsequent to the vesting of title, to the effect that the parties would not partition the property in question. An oral agreement of this character may be effective, if acted upon, and it need not be express but will readily be implied and enforced if necessary to the protection of the parties. The agreement must be made after vesting of title. 29 I.L.P., Partition, §20.

Defendant's counter-affidavit, filed in opposition to plaintiffs' motion for summary judgment, states that she was confused, extremely emotional and overtired at the time of the taking of the discovery deposition, and that by virtue of this extremely emotional, excited and anxious state of mind, she "failed to articulate with particularity facts to adequately support her defense to the plaintiffs' Complaint for Partition." Defendant's attorney filed a similar affidavit. These affidavits were before the court at the time the motion for summary judgment was allowed.

From this record, and although the chancellor found "on the basis of the testimony of Mrs. Noth, it is doubtful whether any such agreement actually existed," we believe the nature of the defense was substantial and that it was not "frivolous or vexatious," but was made in good faith by defendant. This also appears to have been the conclusion of the trial court. The exercise of sound discretion by the trial court should not be

disturbed unless this court is prepared "to find that the determination of the trial court is manifestly and palpably erroneous." (In re Estate of Jaysas, 33 Ill. App.2d 287, 293 (1961).) This we are not prepared to do, and for that reason the order of the trial court denying the apportionment of plaintiffs' attorneys fees out of the proceeds of the sale is affirmed.

AFFIRMED.

ENGLISH, P.J., and BURMAN, J., concur.
Abstract only.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1963

Term No. 63-M-12 Agenda No. 1

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Defendant in Error,	)	Error to the County Court of Alexander County.
vs.	)	(Criminal No. 8136 in said County Court.)
NAPOLEON T. GARRETT, JR.,	)	
Plaintiff in Error.	)	

CULBERTSON, P. J.

Plaintiff in Error, NAPOLEON T. GARRETT, JR., was originally charged in the County Court of Alexander County in a two count Information, with resisting arrest by a police officer, and with aggravated assault with a deadly weapon. Both charges were alleged to have been in violation of the same Section of the Statute (1961 ILLINOIS REVISED STATUTES, Section 31-1, of the Criminal Code). Plaintiff in Error was adjudged guilty by the Court, with-

out a jury, on both counts, and sentenced for a total of two years to the Illinois State Farm. He has served nearly six months prior to this time.

The case before us for review is the Common Law record made in the County Court, no stenographic transcript of the proceedings having been made, or being available on appeal in this Court. It is primarily the contention of Plaintiff in Error that the criminal law record should show that the waiver of the presence of a court reporter was made by defendant when fully apprised of his rights, so that this waiver could affirmatively be shown of record; that the violation of the section of the criminal code referring to the dangerous weapon, constitutes a felony, over which the County Court had no jurisdiction, and that the sentence and conviction was void for lack of jurisdiction; that the Information must allege with definiteness and certainly the offense charged to the extent that it was clearly within the jurisdiction of the County Court; that consecutive sentences are authorized only when a person has been convicted of two or more offenses which did not result from the same conduct, and then the sentence must be certain and definite as to when each term commences and expires; that the criminal record should show the defendant's age, and that recitals in the Court's order

should prevail over the Clerk's record; that where the trial record is lost or inadequate through no fault of defendant, defendant is thereby deprived of his full right of review and should be granted a new trial; that if the Information charging the crime is defective, a finding of guilt of a statutory crime does not establish guilt, and judgment based on a defective Information is void and may be attacked on review; and also, that where an individual by reason of age, ignorance, or mental incapacity, is incapable of representing himself adequately, the failure to appoint counsel for him amounts to a denial of due process.

In response to such contentions the State points out that defendant was charged in the County Court of Alexander County in the two count Information, the first of which charged him in the language of a Statute under Section 31-1 of the Criminal Code, with resisting a police officer; and the second count charged him with aggravated assault while armed with a deadly weapon, under Section 12-2. Due to a clerical error the words "Section 31-1" was also attached to that count, instead of Section 12-2, which would be the proper reference to the Statute of the Criminal Code.

Defendant appeared before the Court, accompanied

by his parents (between whom he had apparently intervened in the incident which caused his ultimate incarceration), and entered a plea of guilty, which the Court refused to accept of record. After the Court had explained his rights to him, the State contends, he was permitted to enter a plea of not guilty, and thereafter, when the case was set for trial, he appeared before the Court, without a jury, and was tried on the Information, each count of which basically charged a misdemeanor; and the State asserts that he was informed of all his Constitutional and Statutory rights, and that the provisions of the Criminal Code (Chapter 38, Section 736-a) referring to a copy of the complaint was simply directory and that therefore, it was not essential from a jurisdictional standpoint that such copy be delivered to him one hour prior to his arraignment, or that there be a written waiver of jury; and also, that the Court was not required to appoint counsel for defendant unless he requested it. It is also the position of the State that under Section 330 of the Criminal Code it is not mandatory that a court reporter be appointed, and the State contends that all of defendant's rights were fully protected during the trial, which was fair and impartial; that the sentence which was imposed was proper; and that such clerical errors as appear in the record should be

disregarded as surplusage.

The contentions of the State that the requirement of Chapter 38, Section 736-a, is directory only, are sound (PEOPLE vs. MILLER, 344 Ill. App. 574), and that while there is no admission that defendant was not furnished with a copy of the complaint, the failure of the record to show in the cause before us that he was given such copy is not ground for reversal. Similarly, the Supreme Court Rule, which requires advice to the accused as to his right of counsel, applies only to cases where conviction may result in imprisonment in the penitentiary (PEOPLE vs. BILL, 33 Ill. App. 2d. 432). In absence of a request for counsel to represent him, there was no duty on the Court in such case to appoint counsel for defendant (PEOPLE vs. EVANS, 397 Ill. 430). Similarly, a waiver of jury need not be in writing (PEOPLE vs. BROWN, 13 Ill. 2d. 32).

On appeal in this Court defendant makes a vigorous contention that count two of the Information charges a felony. Nowhere in such count do the words "police officer" appear, nor do the words "resisting arrest" appear, which would be essential under Section 31-2 of the Criminal Code to charge a felony. Count two is written in the language of the statute as set out in Section 12-2 of the Criminal Code, and charges a misdemeanor, even though

through clerical error the reference is made to Section 31-1. Since a misdemeanor is charged, clearly the addition of this terminology can be regarded as surplusage (PEOPLE vs. OSBORNE, 278 Ill. 104). It is clear that in the language of neither count is defendant charged with a felony. The sentence imposed by the Court of one year on each count, to the Illinois State Farm, with the sentences to run consecutively, was not a sentence to the penitentiary. Such consecutive sentences in cases of misdemeanors have been sustained (PEOPLE vs. PLAYER, 377 Ill. 417; PEOPLE vs. RETTICH, 332 Ill. 49).

We find no reversible error in the record. The judgment is, therefore, affirmed.

Judgement affirmed.

Scheineman, J., and Hoffman, J., concur.

Publish abstract only.

(32825—9-66) 14

STATE OF ILLINOIS

APPELLATE COURT

43 I.A.2d 200

AT AN APPELLATE COURT, for the ~~Fourth~~ THIRD Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE WILLIAM M. CARROLL, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 11th day of OCTOBER A. D. 19 63, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10458 Agenda No. 7

John Irvin May, a minor, by his mother and next friend, Mary Ann May,

Plaintiff-Appellant - Cross-Appellee,

vs.

Zelma Hagerman,

Defendant-Appellee - Cross-Appellant.

Appeal from the Circuit Court of Shelby County

ROETH, Justice.

This suit was brought on behalf of a minor child who at the age of five was injured when struck by an automobile driven by the defendant. A jury returned a verdict in favor of the plaintiff. Damages were fixed at $4,000.00. Judgment was entered on the verdict. Both parties appeal from the judgment entered on said verdict. Plaintiff contends that the verdict of $4,000.00 was inadequate and that the lower court erred in refusing to give three instructions tendered by plaintiff and asks that the judgment of the trial court be set aside and the case be remanded for new trial on the question of damages only. The defendant contends the court erred in its refusal to enter judgment notwithstanding the verdict, contending that there was no evidence to prove that defendant was guilty of negligence. Both parties

filed post trial motions to preserve their contentions, which motions the lower court denied.

The facts in this case reveal that defendant was driving her automobile in an easterly direction along an oiled street in a residential district of Stewardson, Illinois. Plaintiff and his mother were visiting the home of one, Wayne Vonderheide, where plaintiff attended a birthday party for the son of their host. The home was located on the north side of the street on which defendant was traveling and next to a grade school. Plaintiff's mother's automobile was parked approximately in front of this home. As the defendant proceeded easterly she was traveling on the right or in the proper lane at a rate of speed estimated between 10 or 15 or 25 miles per hour. As she approached the vicinity of the parked car another automobile was approaching from the opposite direction. While this was taking place, plaintiff, along with his host and other friends, was playing with a plastic ball in front and to the east of the Vonderheide home. The ball rolled across the street someplace east of the parked car and plaintiff proceeded to run after it. His mother, seeing the automobile coming from the east and proceeding west, shouted at him and he stopped before entering the street. He permitted the west bound car to pass and after it had traveled at least one car length and possibly two or three car lengths, started walking across the street to retrieve the ball. There is some question and the record is not clear at what point the west bound car and defendant's car passed each other. However, the testimony

is that defendant's car traveled more than one car length and possibly as much as two or three car lengths after passing the west bound car, up to the point of the accident. The weather on the day in question was clear and the street dry. Defendant stated she was driving and her mother was in the front seat of her automobile. As she approached the Vonderheide home and before she reached the front of it she saw children playing in the yard of that home and she could hear them at play. She passed the west bound car and did not see plaintiff until the time of impact and she did not apply her brakes until the moment of impact. From the evidence it can reasonably be inferred that she struck plaintiff with the left front fender of the automobile. Defendant's mother, seated next to her, exclaimed, "Are we going to hit him", or, "Did we hit him?", according to defendant's testimony. Her mother was not called as a witness. It is clear, therefore, that while plaintiff was traveling on the right side of the road at a slow rate of speed, she was aware of the presence of little ones in the vicinity and did have the opportunity to see plaintiff for a distance of at least the length of one car.

At the trial plaintiff submitted three instructions which the court refused to give. They are as follows:

"Plaintiff's Instruction No. 13.

"If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damage proved by the evidence to have resulted from the negligence of the defendant:

"The nature, extent and duration of the injury.

"The disability and disfigurement resulting from

the injury.

"The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.

"The reasonable expense of necessary medical care, treatment, and services received.

"The present cash value of earnings reasonably certain to be lost in the future after the plaintiff has reached the age of twenty-one.

"Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guess, or conjecture."

"Plaintiff's Instruction No. 14.

"In the event that you find that plaintiff is entitled to damages arising in the future because of injuries or because of loss of earnings you must determine the amount of these damages which will arise in the future.

"If these damages are of a continuing nature, you may consider how long they will continue. If they are permanent in nature then in computing these damages you may consider how long the plaintiff is likely to live.

"With respect to a loss of future earnings you may consider that some persons work all their lives and others do not; that a person's earnings may remain the same or may increase or decrease in the future."

"Plaintiff's Instruction No. 14-A"

"In the event that you find that plaintiff is entitled to damages arising in the future because of injuries you must determine the amount of these damages which will arise in the future.

"If these damages are of a continuing nature, you may consider how long they will continue. If they are permanent in nature then in computing these damages

you may consider how long the plaintiff is likely to live."

The court initially refused to give instruction 14, and 14-A was substituted by plaintiff. Upon the court's refusal to give 13, plaintiff tendered 13-A, which was given. 13-A was in all respects the same as 13 except that it eliminated the sixth paragraph dealing with the loss of future earnings of plaintiff after he reached the age of 21 years. It is thus noted that the refused instructions were damage instructions and dealt with the item of loss of earnings in the future. In order to properly appraise the trial court's action in refusing the instructions in question it is necessary to consider the medical testimony.

The evidence showed that plaintiff sustained a compound fracture of the fibula and tibia of the right leg. There was a large area of skin damage about the leg necessitating the grafting of skin to the area. There is a scar at the point of skin graft. Considerable difficulty was encountered in bringing the fractures in proper alignment and this was never fully achieved. The fracture ultimately healed with some bending of the leg at the point of fracture. The treating surgeon was of the opinion that the bending of the leg at the point of fracture, while permanent, would become less noticeable as he grew into adulthood. At the time of trial the injured leg was 1/2 inch longer than the other leg. According to the doctor this throws his leg out of angle " a wee bit" which will "tend" to make him become flat footed. This condition "might or could" put a strain on

his ankle, knee and possibly the hip in the future. The lengthened leg "could" be permanent and he "might" be required to wear a lift on the right heel. When asked for his opinion as to plaintiff's future physical activities, such as "strenuous activities, athletic events, common labor or that sort of thing", the doctor was of the opinion that he would have to be careful in future physical activities and that when "he gets out to work, similarly he'd be handicapped in walking across plowed field or walking across uneven ground or being on his feet a long time because of the fact that leg is not 100% true and may throw strains on these other joints in his leg and back".

The loss of earnings instructions where a minor is plaintiff (I.P.I. 30.08-34.01) stem from the case of Wolczek v. Public Service Co., 342 Ill. 482, 174 N.E. 577. This case has been cited in Murphy v. Illinois State Trust Co., 375 Ill. 310, 31 N.E. 2d 305, and recently in Stewart v. Du Plessis, 42 Ill. App. 2d 192, 191 N.E. 2d 622. In the Wolczek case the child lost an arm and sustained a permanent dilation of the heart. The court observed that "it is evident that his earning power will at that time (when he reaches 21 years) be materially reduced." In the Murphy case there was evidence that the plaintiff had to give up her employment because of her inability to do what her job required. In the Stewart case the minor lost an eye and sustained permanent injury to the eye socket so that he was unable to retain an artificial eye. In addition, the case

being tried after he reached 21 years, he testified to his inability to secure work because of this condition. Thus in the three above cases there was definite proof of loss of earning power. In the case at bar the "might" or "could" answers of the doctor inject the element of speculation into the earning power of the minor after he becomes 21 years. Simply because an instruction appears in I.P.I. does not warrant the giving of that instruction in every case. Consideration must be given to the factual situation as developed by the evidence. Attention is called to the fact that the jurors were in fact instructed on the element of permanency in fixing damages, when they were instructed that they could consider the "duration" of the injury and the "disability and disfigurement resulting from the injury" and the "pain and suffering reasonably certain to be experienced in the future". The loss of earnings after reaching 21 years was highly speculative under the record before us and we are of the opinion that the trial court was correct in his rulings on this aspect of the instructions. In addition we are unable to say that the damages were inadequate.

The cross appeal of the defendant is limited to the contention that the trial court should have entered judgment notwithstanding the verdict. Certain basic rules govern our determination of this question. We may not weigh the evidence or attempt to reconcile any conflict in the evidence. We must determine whether there is any competent evidence, standing alone, together with all reasonable inferences to be drawn therefrom

48879

ILLINOIS CONTRACTORS' MACHINERY, INC.,

Plaintiff-Appellee,

v.

M. J. BOYLE & CO., RYAN CONSTRUCTION CO., incorporated, FIDELITY & CASUALTY CO. OF NEW YORK, FIDELITY & DEPOSIT CO. OF MARYLAND,

Defendants-Appellants.

APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendants M. J. Boyle & Co. and Ryan Construction Co. were general contractors who, as joint venturers, had an agreement with the Illinois State Toll Highway Commission for construction of a portion of the Illinois Tri-State Tollway. They subcontracted excavating and grading work to W.M. Wyant Company, Inc. Wyant rented heavy earth moving equipment from the plaintiff, Illinois Contractors' Machinery, Inc., which was used on the job. After paying $10,000.00 on account Wyant defaulted in its payments and was later adjudicated a bankrupt. The plaintiff brought this action for the unpaid rental, for labor in servicing and repairing the equipment, for the rental value of parts supplied to the equipment and for the cost of its transportation. Named as codefendants were the surety companies who furnished the contractors' payment bond. The case was heard without a jury and judgment was entered for the plaintiff. The defendants have appealed.

No bond was required of Wyant under its contract with the prime contractors (in fact a bond was specifically

waived) and it furnished none. The principal issue concerns the surety bond furnished by the prime contractors in compliance with the regulations of the Illinois State Toll Highway Commission. The bond (as abstracted) is as follows:

> "Boyle-Ryan Co. and the Sureties bind themselves in the penal sum of $7,662,340.25, to Illinois State Toll Highway Commission, conditioned to pay all sums of money due for any labor, materials, apparatus, fixtures and machinery, and transportation with respect thereto, furnished to such Principals for the purpose of performing such work in accordance with the provisions of the contract, — — — this bond shall inure to the benefit of any person, firm, company or corporation to whom any money may be due from the Principals, any subcontractor, or other person for any such labor, materials, apparatus, fixtures or machinery, and transportation with respect thereto, so furnished and suit may be maintained on such bond by any such person, firm, company or corporation for the recovery of any such money."

The plaintiff's case is based entirely on this bond. The defendants' contentions in brief are that the bond only covers labor or materials which have gone into and become part of the work; that the heavy earth moving machines rented by the plaintiff did not enter into or become part of the work but survived it and may be used on other jobs; that no recovery can be had for machinery used or repaired, for parts or for services, because it must be presumed that Wyant had the machinery and appliances necessary to carry out its contract, and that it secured this equipment on its own credit as part of its working material and did not furnish it upon the implied credit of the public.

These contentions are, in the main, drawn from the law of mechanics' liens. The theory of the defendants and

their argument in this court are predicated upon such law. They assert that the parties had the Mechanics' Lien Act (Ill. Rev. Stat., 1961, ch. 82, paras. 1-39) and the cases construing it in mind when they contracted.

We do not regard this case as one governed by the law applicable to liens. The plaintiff is not seeking to establish a lien; it is not a subcontractor seeking to recover public funds held for a contractor for work performed on a public improvement. It is seeking redress under the bond the prime contractors gave the Illinois State Toll Highway Commission—a bond they were required to provide as a condition to their being awarded their contract, a bond that inures to the benefit of any company to whom money may be due from any subcontractor for machinery furnished for the purpose of performing the work specified in the contract, a bond that states suit may be maintained by any company for the recovery of the money due. The rights and the obligations of the parties in this case are to be determined from the terms of this bond.

In October 1962, this court handed down an opinion in another case involving the same bond, the same general contractors, the same surety companies and the same subcontractor, Wyant: State Toll Highway Comm. ex rel Patton Tractor & Equipment Co. v. M.J. Boyle & Co., et al., 38 Ill. App. 2d 38, 186 N.E.2d 390. With two exceptions the Patton case and the present one are identical. In the Patton case the trial court sustained a motion to dismiss the complaint and

the suit, here the case proceeded to judgment; there the Wyant Company purchased road machinery on a conditional sales contract, here it rented the machinery. In both cases Wyant defaulted in its payments and the plaintiffs instituted action on the bond. In both cases the issues and arguments are practically parallel.

In the Patton case we pointed out that: statutory provisions concerning mechanics' liens were not controlling; the rights of the plaintiff depended on the meaning of the bond; the bond went much further than the statutory requirement for public performance bonds (Ill. Rev. Stat., ch. 29, para. 15); the contracting parties were not limited to the statutory requirements; the Toll Highway Commission, in the interest of expeditiously building its highways, could demand that the principals and their sureties guarantee payment for all material furnished for the purpose of building the highways; the bond was not ambiguous; the plaintiff could recover upon the bond and the argument that it had no right to do so because it made a conditional sale of the machinery was not tenable. We reversed the order which had dismissed the complaint and the suit.

Our decision in the Patton case is determinative of the present one and it is unnecessary to review the same authorities or to repeat what we said there. The fact that the present case concerns the rental rather than the sale of equipment is immaterial. The plaintiff had the right to sue on this bond and was entitled to recover for its loss.

In contesting the amount of the plaintiff's loss the defendants again turn to the law of liens. These defenses, however meritorious they might be in a lien action, are without merit in an action under the bond. We have examined and found no reversible error in other points advanced to the effect that improper evidence was considered by the trial court in arriving at the amount of the judgment. The court made detailed findings of fact which the record supports. It found that Wyant owed $46,674.40 for rental charges of the equipment which were fair, reasonable and customary charges, owed $717.12 for rental of parts and owed $1,188.12 for labor in servicing the equipment; after crediting the $10,000.00 Wyant had paid on account, judgment was entered for the plaintiff in the amount of $38,579.64.

The judgment is affirmed.

Affirmed.

Schwartz, P.J., and McCormick, J., concur.

2nd DIVISION

Abstract

Gen. No. 11630 Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
MAY TERM, A. D. 1963

43 I.A.2 293

VELMA STEELE, Plaintiff-Appellant, vs. JOHN E. H. BROWN, Defendant-Appellee.	Appeal from the Circuit Court of Kane County. --------

CROW, P. J.

The plaintiff-appellant, Velma Steele, in an action against the defendant, John E. H. Brown, obtained a jury verdict and a judgment for $8,000.00 growing out of an alleged injury sustained by being struck by the defendant's automobile while she was walking across a street in the City of Elgin. The jury also answered a special interrogatory that the plaintiff had exercised ordinary care for her own safety. This is an appeal from an order denying the plaintiff's post trial motion for a new trial as to damages only. The defendant's motions for directed verdict had, during the course of the trial, been denied. The plaintiff claims the verdict was inadequate, contrary to the manifest weight of the evidence, and induced by the prejudicial conduct and remarks of defendant's counsel. The defendant has taken no cross appeal from the judgment for $8,000.00, but contends the damages awarded were more than adequate to compensate the plaintiff for the injuries received in this accident, that most of the plaintiff's damages relate to a pre-existing congenital pseudo arthrosis or sacralization of the right transverse process of her

fifth lumbar vertebra with her sacrum for which the defendant is not liable, the cross examination of the plaintiff and argument of defendant's counsel were based on the evidence introduced by the plaintiff and were proper, and the plaintiff received a fair trial and is not entitled to a new trial on the question of damages only.

On January 25, 1958, a Saturday, the plaintiff, Velma Steele, age 23, and her friend, Luella Sitter, were struck by the defendant's auto while walking westerly in the south crosswalk of Walnut Street, which extends east-west, across State Street, which extends north-south, in Elgin. At this intersection another street, Ryerson, comes into the intersection at the southeast, but does not extend through the intersection. There are traffic lights there. As the plaintiff and Miss Sitter began to cross with the green light, Miss Sitter was to the right and one or two steps ahead of the plaintiff. They had reached approximately the center or west half of State Street when they were struck from behind and the right by the defendant's car. The defendant says his car struck Miss Sitter, who then fell against the plaintiff, knocking her to the pavement. The defendant was making a left turn to go south on State Street from his previous westerly direction of travel on Walnut Street. He had stopped facing west on Walnut for the traffic light. When it turned green he started a left turn. His left turn directional signal lights were on. This was between 5:15 - 5:27 p.m. It was dusk or dark. The lights were on his car. It was raining, or drizzling, or snowing lightly, or had just ceased, at the time. The pavements were wet. His windshield wipers were operating satisfactorily but his view was impaired where the wipers did not extend to clean the windshield. There was an overhanging light for illumination at the intersection. There were street lights on State Street. The plaintiff was not looking in any direction except in front of her. She did

not see the defendant's auto at the time of the striking. Previously she had seen it stopped for the traffic light. She did not see its lights turning the corner. She did not hear it. The defendant did not see the plaintiff or Miss Sitter until just momentarily before striking them, about 3 to 5 feet in front of the left front headlight. He applied his brakes. The car stopped immediately. The motor killed. His horn was not blown. His car was not swerved. Upon being struck Miss Sitter "flew" through the air to land in a standing position about 20 feet south of the south curb line of Walnut Street along the west curb of State Street. The plaintiff became "balled up" under the front of the car near the left front wheel, she says, and was dragged, or slid, or pushed along about 25 feet until the car stopped. The wheel did not run over her. There is a filling station at the southwest corner of the intersection. An attendant there, when he saw the car hit the pedestrians, ran toward the car, yelling to the defendant to stop, and telling him he'd hit the women. The attendant got the plaintiff out from under the car. The defendant got out and asked what happened. The attendant helped the plaintiff walk to the filling station. A police officer arrived, interrogated the parties and the attendant, issued a traffic ticket to the defendant for failure to yield the right-of-way, took the plaintiff and Miss Sitter to St. Joseph's Hospital, Elgin, and thereafter took them to their home. He said the ladies did not seem to be too badly hurt. The defendant said he was going about 5 m.p.h. at the time of the accident. The attendant at the filling station said he was not going too fast, maybe 10-20 m.p.h. The defendant said his car did not travel over 3 to 5 feet after he applied the brakes. The filling station attendant says he went 15-20 feet, - something like that, - before stopping and when he did stop he blocked the north driveway of the station, - which driveway abuts

the south cross walk of Walnut Street. There were no dents or brush marks on the auto afterwards. The plaintiff's clothing was not torn. The defendant says the plaintiff was 7 to 8 feet in front and left of his car when it stopped.

The evening of the accident the plaintiff was examined at St. Joseph's Hospital, Elgin, by Dr. Lazar E. Zimmerman. X-rays were taken, particularly of her back. There were no fractures. There were contusions. She had a bruise on the right elbow and on the right buttock. Those were the only objective evidences of injury. She was released the same evening, and advised to take a hot bath, and rest, which she did, and see the doctor in a couple of days. Dr. Zimmerman again examined her at his office Monday, January 27th. On the fourth day after the accident, while at work, she having returned to regular work the Monday following the accident of Saturday, January 25th, she had some swelling in the region of her stomach and lower lumbar back. On Wednesday, January 29th, she was confined at St. Joseph's Hospital for 5 days. She received heat therapy to her back, right hip, and right leg. Upon her release, at the doctor's suggestion, she obtained a special corset to relieve pain in the lower lumbar region. She wore that until May, 1958. She continued to see Dr. Zimmerman weekly and had medication for pain across her back and in her right leg to the knee.

Dr. Zimmerman had the plaintiff see Dr. Lyman Smith, an orthopedic surgeon, on May 20, 1958. Tests and x-rays were again done, at Sherman Hospital, Elgin. At Dr. Smith's suggestion, in June, 1958, she was put in a cast from the armpits to the lower back. That remained on for 6 weeks. Her leg became more numb, the pain increased and traveled from the right knee to the ankle. She exercised the leg once a day for several weeks. The cast was later removed. She resumed the corset until September, 1958. She continued daily ex-

ercises of her legs. She had medication for pain, though Dr. Smith did not give her any such medication. She stopped seeing Dr. Smith in September or October, 1958.

Then she returned to Dr. Zimmerman. He later gave her cortisone injections in the right hip or back to ease pain, but not until at least December, 1959. She also had pills for pain relief, and applied heat to the tender areas by hot baths and heating pads.

In July, 1960 she was again in Sherman Hospital, - this time for 13 days. She was in traction part of the time. Pain covered her entire back and leg. She also received some heat therapy. Dr. Smith again saw her there.

After her release July 30, 1960 from Sherman Hospital, Dr. Zimmerman sent her to Dr. Donald Miller, an orthopedic surgeon in Oak Park. She entered Oak Park Hospital August 19, 1960. Tests were done. On August 25, Dr. Miller performed a laminectomy on her back. The intervertebral disc between the fifth lumbar vertebra and the sacrum was removed. For a few days she could not move her extremities, was in pain, and had pain medication. For the first time she had pain in her right foot and shoulder. She was released from that hospital September 10, 1960.

She returned to work October 3, 1960, the new job being less physically taxing than her prior job had been. She had help in the job. Once at work and once at home in 1958 her legs would not move. She continued to have pain in the lumbar region, right hip, and up towards her neck. She had oral pain killing pills, and shots from Dr. Miller or the Oak Park Hospital. She never complained, however, to her doctors about pain radiating to her neck and her doctor witnesses did not corroborate that.

She again entered Oak Park Hospital February 22, 1961, and was there 24 days that time. On February 23rd, Dr. Miller performed a

second laminectomy and fusion operation. Afterwards she had the same difficulties as after the first operation. She also had spasms of the right leg muscles. She had some more therapy. She was absent from work from February 22 to May 23, 1961.

At present she does not swim, bowl, or roller skate, as she did prior to the accident. She has back and right leg pain. She has leg muscle spasms about once every 24 days. She has pain relieving shots every two weeks. She said, however, she is physically able to perform her work most of the time.

If future possible attempts to stretch her leg are unsuccessful, a third operation may be necessary.

Before January 25, 1958, she had had no prior injury. She had been in a hospital on two other occasions, both related to her appendix, - in the first instance, November, 1955, no operation was performed, and in the second instance, June, 1956, an appendectomy was done. She had not complained of back pain before. She had had no prior back treatment. There was no limitation of motion in her back.

There appears to be no doubt but that the plaintiff had, prior to this accident, a congenital pseudo arthrosis or sacralization of the right transverse process of the fifth lumbar vertebra and the sacrum, and, accompanying that, a preexisting congenital disc lesion of the intervertebral disc between that vertebra and the sacrum. The matter is referred to in general terms in the opening statement of counsel for the plaintiff to the jury. The plaintiff said, though, that she did not know she had that congenital condition until the time of the trial. This is a type of false joint between that vertebra and the sacrum. On the right side of her fifth lumbar vertebra is a large bony extension called a transverse process. She was born with that abnormality, or it grew until puberty. The transverse process

was in some way unnaturally resting upon and attached to the sacrum, - by a bony attachment, or fibrous cartilage tissue. The condition is painful in some people and not in others. X-rays of November 29, 1955, December 5, 1955, and December 26, 1956, prior to the accident, when she was in the hospital in connection with her appendix, indicate the congenital condition of the back. Movement of the false joint causes bone to grate upon bone and some arthritic changesand some pain. It is an accepted medical practice to perform laminectomies, or spinal fusions, for unilateral pseudo arthrosis in the back.

Her medical, hospital, drugs, and miscellaneous expenses to the time of trial were $4314.29, - being $497.00 for Dr. Zimmerman, $63.00 for Dr. Smith, $1010.00 for Dr. Miller, $140.00 for the anesthetist, $113.10 for St. Joseph Hospital, $411.45 for Sherman Hospital, $1922.90 for Oak Park Hospital, $131.66 for drugs, and $25.18 for the corset brace. She had, as appears from her Exhibits 25 and 26, loss of earnings from work time of $2426.54. The total medical etc. expenses and loss of earnings was $6740.83. She had been employed at the Elgin office of the Social Security Administration from August, 1957 to the time of the trial. Her take home pay was $65 - $68 per week on January 25, 1958. It has subsequently been increased. Her loss of earnings time was $295.37 for 1958, $78.12 for 1959, $903.35 for 1960, and $1149.70 for 1961, - totalling $2426.54. She may have future medical and hospital expenses and loss of earnings.

From January 25, 1958, the date of the accident, to August, 1960, the first operation by Dr. Miller, the plaintiff was not off work from her regular employment as much as a half a day a month. She worked regularly from March to December, 1958, except for 23 hours and 1 day of sick leave scattered through that period. For the period December, 1958 to April, 1959 there are no employment records. She says, however, she did not lose any time for the per-

iods for which there are no records. For the period April, 1959 through July, 1960 she worked regularly except for 51 hours sick leave scattered in September, December, 1959 and March, April, May and June, 1960.

She introduced as plaintiff's exhibits 25 and 26 her employment time and attendance records, Exhibit 25 being for April, 1959 - May 16, 1961, and Exhibit 26 being for 1958, to indicate the time missed on her job. On Exhibit 25 there is, inter alia, an indication of her accumulated annual leave and sick leave. Exhibit 26 is a memo of her employer giving the work days in 1958 she was absent due to sick leave. As of July 9, 1960 she had 181 hours accrued annual leave and 134 hours accrued sick leave. The defendant on cross examination of her and her employer's representative, her witness, asked certain questions about the annual leave and sick leave notations on the exhibits. In the arguments to the jury the defendant alluded to such leave notations on those exhibits, saying that such does not enure to the benefit of the defendant but was important as to whether the plaintiff had in 1958 and thereafter been planning the operations she later had and from which, because of the accumulated leave, she did not lose much actual pay. There is no indication of any objection by the plaintiff to that argument. In the previous plaintiff's argument to the jury her counsel had also referred to such leave and had also urged that the defendant was not entitled to any benefit therefrom.

Drs. Lazar E. Zimmerman and Donald S. Miller testified for the plaintiff.

Dr. Zimmerman is a general practitioner. He said her objective symptoms on January 25, 1958 were contusions of the right back, buttock, and right elbow. X-rays were taken. There were no fractures. She had a pseudo arthrosis, or false joint, of the fifth

lumbar vertebra with a sacralization, or union with the sacrum, on the right side. There was some type of union between the fifth lumbar vertebra and the sacrum. This is a congenital abnormality. It is not the strongest type of back. It is not necessarily painful. It can cause localized low back pain without trauma. Trauma is an aggravator of this condition. She complained of pain in her back and buttock. He suggested a corset. She wore such for about 3 months. She complained constantly of pain in the lumbar area. She was in St. Joseph's Hospital January 29 - February 2, 1958. She was in hyper-extension there. X-rays also indicated possible pressure on the sigmoid colon and a terminal ileitis, for which she was told she should have surgery, but that was not done. Upon release she had mild narcotic medications for pain. These were not strong relief measures. He gave her nothing stronger than 1/2 grain of codein, which is not a large dosage. She had mild, not severe pain. In the next few months she had occasional cortisone injections in the right sacral region, divarine injections for pain, and pain killing drugs in pill form for arthritis and rheumatism. There was some limitation of movement of her right leg. In July, 1960 she was admitted to Sherman Hospital. He called Dr. Smith for consultation. Dr. Smith said, July 20, 1960, she should not have a spinal fusion or laminectomy. She was in traction part of the time. She had diathermy heat treatments. She had analgesic drugs for pain and to relax muscles. He last saw her August 15, 1960. He referred her to Dr. Donald Miller.

Dr. Miller is an orthopedic surgeon. He saw the plaintiff August 9, 1960 at Dr. Zimmerman's request. She had a rigid spine, some immobility, some loss of motion. She had a sciatica - with considerable pain. Her muscles were tight. When one attempted to raise her right leg she had discrepancies in her ankle jerk reflexes.

She had some thinning of her right calf. The right thigh was not appreciably different than the left. She had some loss of function or movement of the big toe, - that is, the large muscles going to the large toe. She complained of pain in the back, right buttock, and right thigh and calf. She was admitted to Oak Park Hospital for a series of tests. She had a congenital false joint between the transverse process of the fifth lumbar vertebra and the sacrum, - a sacralization. An x-ray of November 29, 1955 shows a congenital diminution of space between the vertebra and sacrum. There was an abnormal disc situation. All the x-rays were negative as to fractures. There was some degenerative osteoarthritic irregularity. After five days a laminectomy was performed on her spine. This consists of taking out the back part of the bone to detect and find a disc at the lumbar sacro first level, which is the lower portion of the spine. The congenital protusion on the disc between the fifth lumbar vertebra and the sacrum was removed in that operation. This is a very painful operation and drugs and medicines are prescribed to relieve pain. Post-operative care consisted of complete bed rest and a requirement that the patient wear a corset at all times when out of bed. For several weeks after that operation the plaintiff's condition seemed to have improved, but unfortunately a different type of pain of different intensity recurred. The cause of this new pain was the same sciatic nerve root. She was re-admitted to Oak Park Hospital for a second operation on February 23, 1961. She could not extend her leg beyond 30 degrees. Her ankle jerk reflexes were still gone. She had considerable pain and sensitivity. In the second operation adhesions were removed from the fifth lumbar vertebra where the disc in the original operation was operated on. The plaintiff was kept in the Hospital for 3½ weeks that time. Again she was given various drugs for pain, had complete bed rest, and was

given some therapy. During this post-operative period the plaintiff received part of her anti-pain drugs in the form of 16 injections into the nerve or around the nerve in order to alleviate pain in the right thigh and calf and the right buttock. The plaintiff was also complaining of numbness in her third and fourth toes on her right foot. She was still having some irritation of the nerve root at the fifth lumbar vertebra. He last saw the plaintiff on September 9, 1961, and at that time she could not bend her back obviously as well as she could before, because they had fused her by the operations, i. e., had taken bone chips in the first operation and put them on the right side, - that is a fusion. Such is independent of the other subsequent operation. An x-ray of July 15, 1960 shows a congenital transverse process of the fifth lumbar vertebra and sacralization with the sacrum, a condition with which she was born. It is possible for such to cause local pain, without trauma. The condition existing by itself does not call for an operation and is usually not operated on. Pain can be caused by such by the rubbing of muscles against bone. It could be occasionally aggravated by trauma. Dr. Miller was asked:

> "Now as a result of this last examination of Velma Steele did you come to any opinion as to whether there could or might be need for further care or treatment and/or surgery as it relates to her present condition?"

and he answered:

> "Well certainly on September 9th, this last visit, I felt she had continued pain and hoped that she would improve; she is still under treatment, of course, and there is a question in my mind whether she needs a third operation - she may need one."

The surgical cost of any further operation, if any, would be $400 or $500, and the hospital charge would be similar to that for the same period during the first and second operations. The condition in the

lumbar section of the back is permanent. The condition in the operated section of the back in the first and second operations could or might have been caused by trauma.

Drs. Alvin A. Zeman and Jack Rosenberg testified for the defendant.

Dr. Zeman is a radiologist. He did the x-ray or radiological interpretation at St. Joseph's Hospital. The x-ray of December 5, 1955 of Velma Steele indicates a sacralization with pseudo arthrosis, or a false joint of the fifth lumbar vertebra with the sacrum. An x-ray of December 26, 1956 shows the same thing. This is on the right side. Because the abnormality is unilateral it unstablizes the back. Very often this unilateral congenital condition causes low back pain. The x-rays show reactive changes in the area. Such suggest some mechanical irritation phenomena from abnormal weight bearing, which usually causes local pain. There are some arthritic inflammatory changes. The vertebra bone has no cartilage like a normal joint. There is a diminution of the lumbar sacral interspace between the vertebra and sacrum. A normal disc space has not developed. All can contribute to pain, - a degenerative disc, diminished interspace, unstable back, irritated transverse process, - all lead to low back pain and radiated root pain. A narrowed intervertebral space frequently is accompanied by low back pain. It does not definitely cause pain. Subsequent x-rays do not differ appreciably. The 1955 x-rays were taken in relation to an appendicitis complaint. He'd never seen Velma Steele. Trauma can cause aggravation of pain of such congenital condition.

Dr. Rosenberg is an orthopedic surgeon. He examined Velma Steele October 20, 1960 and September 7, 1961. The joint formed between the large transverse process and the sacrum is of fibrous tissue, - of the "scar" classification. This will cause some fric-

tion and pain in the lower back region if the transverse process on the fifth lumbar vertebra is joined with the sacrum. There is always friction there. Friction has to cause pain. He'd never treated or prescribed for the plaintiff.

The plaintiff's given instruction 13 was:

> "If you decide for the plaintiff, Velma M. Steele, on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate her for any of the following elements of damage proved by the evidence to have resulted from the negligence of the defendant:
>
> The nature, extent and duration of the injury.
>
> The aggravation of any pre-existing ailment or condition.
>
> The disability and disfigurement resulting from the injury.
>
> The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.
>
> The reasonable expense of necessary medical care, treatment, and services received and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future.
>
> The value of time, earnings, profits and salaries lost and the present cash value of the time, earnings, profits and salaries reasonably certain to be lost in the future.
>
> Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guess, or conjecture."

That appears to be a fair, accurate, and adequate statement of the essential elements of her possible damages. The jury determined upon and fixed $8,000.00 by its verdict as her damages proved by the evidence to have resulted from the negligence of the defendant. The plaintiff says this is inadequate, contrary to the manifest weight of the evidence, and induced by the prejudicial conduct and remarks of defendant's counsel, and she asks for a new trial as to damages only.

An inadequate verdict may be set aside and a new trial ordered solely on the issue of damages in a proper case, that is, in a case where the damage issue is so separable and distinct from the issue of liability that a trial of it alone may be had without injustice, - where the verdict against a defendant on the question of liability is amply supported by the evidence the question of the amount of damages is separable and distinct from the issue of liability and the error, if there by any, which resulted, if it did, in inadequate damages does not affect the issue of liability: PAUL HARRIS FURNITURE CO. et al. v. MORSE et al. (1956) 10 Ill. (2) 28.

If prior to this accident and prior to whatever injury the plaintiff received therefrom the plaintiff had a preexisting congenital back infirmity, which she unquestionably did, and if such was aggravated by the accident and particular injury in question, which was for the jury to decide, she might recover appropriate damages from the defendant, but the defendant's liability in damages is measured by the damages which were the natural and proximate result of his negligence; if there was an aggravation of a preexisting congenital infirmity the defendant would be liable only for what resulted from this accident and from whatever injury she received therefrom: CITY OF ROCK ISLAND v. STARKEY (1901) 189 Ill. 515. If the accident was not the proximate cause of all of the plaintiff's subsequent condition, though it may have been intensified by the accident, the plaintiff is entitled to recover only for that part of her suffering and condition which probably resulted from the injury: LISENBURY v. ST. LOUIS etc. RY. CO. (1913) 184 Ill. App. 395.

A new trial may be granted where the verdict is grossly, wholly, or palpably inadequate; to decide the question of adequacy, all of the evidence pertaining to damages must be considered, not merely the amount of the medical bills; and whether the jury has been properly

instructed upon the measure of damages should be carefully inquired into; when the jury has been correctly instructed upon the measure of damages, and the size of the verdict does not clearly indicate it was the result of passion or prejudice upon the jury's part, and there is no other evidence of such in the record, the jury award should not be disturbed unless the objective evidence positively and unequivocally shows that damages, clearly proven, have been overlooked: GIDDINGS et al. v. WYMAN (1961) 32 Ill. App. (2) 220, - affirming verdicts and judgments for the plaintiffs in the exact amounts of their medical expenses and denying the plaintiffs a new trial on the question of damages alone. There may be, in a particular situation, a rational basis for the jury's verdict, - namely, a finding that the plaintiff's subsequent state of ill being is not the result of the accident in question; a jury may have a choice of inferences in reaching its ultimate conclusion as to the questions of causal connection and the nature and extent of injury; a court cannot substitute its findings for those of the jury where there is a conflict in the evidence or different reasonably possible inferences and conclusions to be drawn therefrom; it is solely within the province of the jury to ascertain from among all the medical and other testimony presented the facts on the issues of causal relationship and the nature and extent of injury; the credibility of witnesses, the weight of the evidence, and the inferences to be drawn from facts proved are all questions for the jury to pass upon and not for a Trial or Appellate Court to decide; as far as damages are concerned, if the record fails to indicate the verdict is not the result of the impartial and honest judgment of the jury, or that it was clearly and palpably erroneous, it cannot be said to be inadequate or erroneous in amount: MUSCARELLO v. PETERSON (1960) 24 Ill. App. (2) 262, reversed and remanded on other grounds, (1960) 20 Ill. (2) 548. From the amount of a verdict it may appear the

jury recognized that it was doubtful whether, or to what degree, an accident aggravated a preexisting physical ailment or infirmity: MELTZER v. SHKLOWSKY (1944) 321 Ill. App. 400.

Another principle to be kept in mind in considering and analyzing this evidence and problem is that a jury is not bound to believe anything to be a fact simply because a witness has stated it to be a fact, if the jury believe from all the testimony that the witness is mistaken or has testified falsely: PEOPLE v. MILLER (1939) 371 Ill. 333; GOSS PRINTING PRESS CO. v. LEMPKE (1901) 191 Ill. 199.

There may be some doubt here whether this is, in any event, an otherwise theoretically possible proper case in which an inadequate verdict, if it were so determined, might be set aside and a new trial ordered solely on the issue of damages, because there may be some doubt whether the verdict against the defendant on the question of liability is so amply supported by the evidence that the damage issue can be properly said to be separable and distinct from the issue of liability and that a trial of it alone could theoretically be had without injustice. We shall assume, however, for the present purpose, that it is an otherwise theoretically possible proper case for such, and proceed to consider whether under the law and facts the verdict for $8000.00 is inadequate, contrary to the manifest weight of the evidence, or induced by any prejudicial conduct or remarks of defendant's counsel.

No extensive summarization or comment on the evidence is necessary. But, briefly, these are some of the highlights and some of the things the jury may have properly considered, and probably did. The plaintiff had, prior to this accident, a preexisting congenital pseudo arthrosis or sacralization or false joint of the right transverse process of the fifth lumbar vertebra and the sacrum, and,

accompanying that, a preexisting congenital disc lesion of the intervertebral disc between that vertebra and the sacrum. Then she was involved in this accident of January 25, 1958. She was evidently not hit too hard by the car. The wheel did not run over her. She got up and walked afterwards. The defendant's car was not dented or marked afterwards to indicate any hard collision. Her clothing was not torn. The police officer who soon arrived, talked with her, took her to the hospital, and then took her to her home, said she did not seem to be too badly hurt. In the examination at the hospital that evening it was determined she had no fractures. Bruises on her right elbow and buttock were the only objective evidences of injury. She did not stay in the hospital even overnite, but went home.

She returned to her regular work Monday following the accident of Saturday, the 25th. Later that week she was in the hospital for a few days, but the treatment was simply heat therapy. Dr. Zimmerman subsequently gave her some moderate medication for mild pain in her back.

She did not see an orthopedic surgeon until May 20, 1958, - 4 months after this accident, - when she saw Dr. Smith, and continued to see him until the fall of that year. Dr. Smith did not give her any medication for pain. For some unexplained reason she did not call Dr. Smith as a witness here.

She then continued with Dr. Zimmerman from the fall of 1958, all through 1959, and in 1960 to about July 30th, during which time she had some pills for pain relief, and heat treatments, and beginning not until December, 1959 some cortisone injections. Not until July, 1960, 2 years and 6 months after this accident, was she in a hospital again, - Sherman Hospital, and saw Dr. Smith again. Dr. Smith recommended, July 20, 1960, that she not have a laminectomy operation on her back.

Nevertheless, she saw Dr. Miller, went to Oak Park Hospital, and on August 25, 1960, about a month after Dr. Smith's advice to the contrary, and 2 years and 7 months after this accident, Dr. Miller performed a laminectomy operation on her back. She returned to her regular work October 3, 1960.

Only once at home and once at work, in 1958, did she complain of her legs momentarily not moving. Again, February 23, 1961, over 3 years after this accident, she had another laminectomy and fusion operation by Dr. Miller at Oak Park Hospital. Despite her ailments she said at the time of trial that she was physically able to perform her regular work most of the time. In fact her wages have been increased. Laminectomies, or spinal fusions, for such a condition, - regardless of trauma, - are an accepted medical practice in proper cases.

Of her $4314.29 medical etc. expenses, $3072.90 thereof were for Dr. Miller, the anesthetist at the operations, and Oak Park Hospital where the operations were performed, all incurred 2½ - 3 years after this accident. Of her $2426.54 loss of earnings, $2053.05 was for 1960 and 1961, 2 and 3 years after the accident, - and only $295.37 was for 1958, the year of the accident, and $78.12 for 1959, the year after the accident. From January 25, 1958, the date of the accident, to August, 1960, the first operation, she was not off work from her regular employment as much as a half a day a month.

Dr. Zimmerman said her congenital condition is not necessarily painful, but it can cause pain without trauma, and trauma is an aggravator of the condition. He gave her mild narcotic medications for pain, not strong relief measures, and she had mild, not severe, pain. Dr. Miller said that several weeks after the first operation a different type of pain of different intensity recurred, though the cause was the same sciatic nerve root; her congenital con-

dition may cause pain, without trauma, - it is usually not operated on, - pain can be caused by such by the rubbing of muscles against bone, - and it could be occasionally aggravated by trauma. He did not positively indicate any further operation might be necessary, or, if so, that it would be due to this accident. And he is the only medical witness who said her condition in the operated section of the back could or might have been caused by trauma. Dr. Zeman said her congenital condition very often causes pain, - all the elements can contribute to pain, - though it does not definitely cause pain, - and trauma can cause aggravation of the pain. And Dr. Rosenberg said there is always friction in her congenital condition and friction has to cause pain.

Under all the circumstances we cannot say the verdict is inadequate or contrary to the manifest weight of the evidence. It is not grossly, wholly, or palpably inadequate. The jury was properly instructed upon the elements and measure of damages. The size of the verdict does not clearly indicate it was the result of passion or prejudice upon the jury's part. And there is no other evidence of such. The objective evidence does not positively and unequivocally show that damages, clearly proven, have been overlooked. The record fails to indicate the verdict is not the result of the impartial and honest judgment of the jury. There is an entirely rational basis for the jury's verdict, namely, a finding that some, but not all, of the plaintiff's state of ill being subsequent to this accident was a proximate result of the accident. They had to determine the nature, extent and duration of the particular injury, if any, received in this particular accident, - the aggravation, if any, of any preexisting ailment or condition, and if there were any such aggravation then how much and to what degree, - the disability and disfigurement resulting from this injury, - the pain and suffering, if

any, experienced and reasonably certain to be experienced as a proximate result of this particular injury, the reasonable expense of necessary medical care received and the present cash value of such reasonably certain to be received as a proximate result of this injury, - and the value of time and earnings lost and the present cash value of time and earnings reasonably certain to be lost as a proximate result of this injury. All of those elements and determinations necessarily involved matters of degree and relativity and necessarily required the forming of a judgment by the jury from all the facts, a weighing of the evidence, and determinations in certain instances of the credibility of the witnesses. If, as they may have, they determined that some, but not all, of her condition after the accident was a proximate result thereof, or the nature of the particular injury was not as serious as the plaintiff thought, or the degree of aggravation, if any, of her preexisting ailment was less than the plaintiff considered, or the disability and pain and suffering were due only partially to this accident and injury, or that only a part of her expenses of medical care and only a part of her loss of time and earnings can be said to be reasonable and necessary as a proximate result of this accident and injury, - we cannot say such determination is contrary to the manifest weight of the evidence.

As to the plaintiff's exhibits 25 and 26, the annual leave and sick leave notations and accumulations are plainly stated on the face of exhibit 25, and sick leave absences are about the only thing referred to in exhibit 26. The plaintiff and her employer's representative, her witness, testified about those exhibits. They were offered in evidence by the plaintiff without any qualifications, and were so admitted in evidence. The defendant was entitled to cross examine the plaintiff and her witness concerning her exhibits,

within the normal limits of cross examination, which is largely within the Trial Court's discretion, and it does not seem to have gone beyond normal limits under the circumstances. The defendant was entitled to make fair comment in argument concerning her exhibits also. The defendant did not argue he was entitled to any benefit because the plaintiff had some accumulated leave. And the plaintiff did not, in any event, object to his argument. In fact the plaintiff had also urged in her own argument to the jury that the defendant was not entitled to any benefit from her accumulated leave. The plaintiff brought the whole matter to the attention of the jury and she cannot avail of any error, if any, of her own creation: WEINLANDER v. VOLKMAN (1910) 153 Ill. App. 137; she has no cause of complaint because of the admission of evidence offered by herself: BOTTS v. BOTTS (1908) 142 Ill. App. 216; WARTH v. LOWENSTEIN AND SONS (1906) 219 Ill. 222; SHOBER etc. LITHOGRAPHING CO. v. KERTING (1883) 107 Ill. 344; a statement to a jury, even if otherwise objectionable, cannot be questioned when it has been invited: CUNEO v. CITY OF CHICAGO (1937) 292 Ill. App. 235; a party cannot complain of errors, if any, which he has committed, invited, or induced the Court to make, or to which he has consented: MEYER v. POLIVAT et al. (1957) 13 Ill. App. (2) 491. The jury was, moreover, fully and fairly instructed as to any annual leave or sick leave by the plaintiff's instructions 16 and 19. Her instruction 16 was:

> "If you decide for the plaintiff, Velma M. Steele, on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate her for any damages proved by the evidence to have resulted from the negligence of the defendant.
>
> In this regard, you are not allowed to consider any evidence which has been produced by either side as it pertains to any sick pay or other compensation that has been received by the plaintiff, Velma M. Steele, from any person or organization as mitigation of the damages to the plaintiff, Velma M. Steele, caused by defendant.

> Any amount received by the plaintiff, Velma M. Steele, in payment of part of her damages by one other than the defendant does not enure to the benefit of the defendant."

And her instruction 19 was:

> "If you decide for the plaintiffs on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate them for any damages proved by the evidence to have resulted from the negligence of the defendant.
>
> Any amount received by the plaintiffs in payment of part of their damages by one other than the defendant does not enure to the benefit of the defendant."

LUKICH v. ANGELI et al. (1961) 31 Ill. App. (2) 20, referred to by the plaintiff, did not involve a motion by the plaintiff for new trial solely on the issue of damages, but a new trial generally; the Trial Court there had allowed the plaintiff's motion and granted a new trial, - and as the Appellate Court said, - this is a proper area for the Trial Court's discretion, - whereas here the Trial Court denied the plaintiff's post trial motion for new trial solely on the issue of damages; and the facts were not analogous to those here concerned. AVRAMUS et al. v. FULLER (1945) 325 Ill. App. 694 and NOVITSKY et al. v. BOLAND (1944) 322 Ill. App. 698, referred to by the plaintiff, are abstract decisions, it is difficult to understand what the particular facts were, and they apparently did not involve allowing a plaintiff a new trial solely on the issue of damages, but a new trial generally. STROYBECK v. A. E. STALEY MFG. CO. (1960) 26 Ill. App. (2) 76 and O'BRIEN v. HOWE (1961) 30 Ill. App. (2) 419, referred to by the plaintiff, did involve the allowance of a new trial to a plaintiff solely on the issue of damages, but the facts as to the injuries, the plaintiff's preexisting condition, pain and suffering, medical expense, loss of earnings, and size of the verdicts were not analogous to those here presented.

A Trial Court has a considerable degree of discretion in considering motions for new trial and particularly motions for a new trial solely on the issue of damages. It considered the same contentions presented to us, but with the added advantage of having had an opportunity to see and hear the witnesses. We do not believe there was any abuse of discretion in denying the motion here.

The judgment, accordingly, is affirmed.

AFFIRMED.

Spivey, J. and Wright, J. Concur

No. 11702 PUBLISH ABSTRACT ONLY Agenda No. 3

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

FEBRUARY TERM A. D. 1963

43 I.A.2 294

HAROLD L. MENDENHALL, Plaintiff-Appellee,	:	Appeal from the
v.	:	Circuit Court of
LORRAINE MENDENHALL, Defendant-Appellant.	:	Grundy County

Smith, J.:

On the wife's petition to find the husband guilty of contempt of court for failure to comply with a divorce decree the court exonerated the husband. On his cross-petition for a modification of the decree as it relates to alimony and support, the court found a waiver of certain monthly payments, made a determination of arrearages, computed the amount currently due at a reduced figure and reduced the monthly payment both as to alimony and as to support payments. Attorneys fees were denied to each party. The wife appeals and charges error in the following respects: (a) That the original decree provided for alimony in gross payable in monthly installments and thus was not subject to modification, (b) that the court unlawfully applied a percentage formula in the reduction of payments, (c) that there was no valid waiver of any payments and thus the computation of arrearages was erroneous and (d) that the court could not modify the support payments retrospectively. She also complains about the disallowance of attorney fees.

The original decree of divorce was granted the wife on the charge of desertion beginning on December 2, 1955. The decree was dated October 3, 1958. Two children were the product of this marriage, Janice, age 16, and Larry, age 12. The decree found that the parties had, during the pendency of the suit, entered into a property settlement which the court found to be equitable and approved. After awarding the wife the household goods, two $25.00 bonds, $1,000.00 cash and requiring her to surrender possession of the property in which they had lived, the decree then provided for $50.00 per month to the wife for alimony, $100.00 per month for each of the children, terminating as to each child when he or she reached his or her majority and then providing that when Larry (the younger) reached twenty-one years of age "all payments to the cross-plaintiff (the wife) shall terminate". The decree further provided that each mutually released the other from "all rights, claims or demands" and provided that the death or remarriage of the wife would terminate all payments allocated as personal alimony.

A property settlement, either written or oral is deemed to be merged in the decree entered in the cause and to have incorporated by implication the provisions of the Divorce Act. Larson v. Larson, 21 Ill. App. 2d 264, 157 N. E. 2d 689, Loeb v. Gendel, 29 Ill. App. 2d 155, 172 N. E. 2d 408. Our Divorce Act, Illinois Rev. Stat., 1961, Chapt. 40 Par. 19 provides in part:

> "Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after the entry of a decree for divorce . . . make such order for alimony and maintenance as . . . shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony or where the court by its decree has denied alimony."

There were no recitations in the instant decree finding that any of the three prohibitions against modification existed. Appellant contends that the $50.00 per month was payable for a time certain, i.e. when Larry became twenty-one years of age in November, 1968, and being for a fixed, definite amount, is alimony in gross and not subject to modification. The authorities do not support this position. Where the decree and the settlement agreement provided for the payment of $900.00 per month to the wife for ten years and one month and stated that such payment should constitute a lump sum settlement in lieu of alimony the court held it was not alimony in gross. The court said:

> "The statement, 'this sum shall constitute a lump sum settlement in lieu of alimony', did not change the character of the monthly payments to a gross sum. (Herrick v. Herrick, 319 Ill. 146, 153, 149 N.E. 820)."

Loeb v. Gendel, 29 Ill. App. 2d 155, 159, 172 N.E. 2d 408. There was no such statement in the instant decree. It is apparent that we are not dealing with alimony in gross, that the decree is subject to modification under the statute and that the trial court correctly so held.

The record in this case shows that at the time of the decree, the take home pay of the husband was $525.00 per month with a residence furnished free by his employer with a rental value of $100.00. At the time of the modification the husband's take home pay was $350.00 or, as the trial court computed it, 56% of the former amount. Using a 56% formula, the trial court reduced the wife's monthly stipend to $28.00 and the child support to $56.00. The court did not base its determination solely upon a percentage formula. It found that the needs of the wife and the needs of the husband had not changed substantially since the original decree and that the only change in circumstances was the reduction in the husband's ability to pay. His minimum needs as shown

by the evidence is $305.50 per month. He is maintaining hospital insurance on himself and Larry at about $12.00 per month. Thus the modification decree requires him to pay some $50.00 per month more. We cannot say the trial court abused his discretion or violated any of the announced principles in arriving at his determination. This is just another case of trying to get a gallon and a half of water out of a gallon bucket. Both parties will have sacrifices to make. Neither party will come out whole. Page v. Page, 32 Ill. App. 2d 422, 178 N. E. 2d 129 has recently reviewed the authorities and their repetition here is not necessary, nor is it required. It is elemental that there is no hard and fast rule for fixing alimony.

In computing the arrearages the court found that they had been waived up to October 1, 1961. He further modified the payments retrospectively on March 19, 1962 to October 1, 1961. Illinois joins with the majority rule in this country that past due alimony becomes vested and that relief from an alimony decree can be obtained only prospectively on an application for modification based on equitable circumstances. Snip v. Snip, 35 Ill. App. 2d 427, 183 N. E. 2d 175, Craig v. Craig, 163 Ill. 176, 45 N.E. 153, 94 A. L. R. 332, 333. It follows that the trial court erred in modifying the original decree retrospectively.

The finding that certain arrearages had been waived is based on letters passing between the attorneys. The husband lost his job. The wife's attorney wrote to his attorney calling attention to the non-payments. The husband then stated that he could not pay the $150.00 per month but could send $10.00 per week. The wife replied that that would be acceptable if she

could claim the boy as an exemption on her income tax and if the arrearages were paid. The husband made the $10.00 per week payments but did not pay any of the arrearages, nor did he permit her to claim the boy as a tax exemption. The $10.00 payments continued from June to October when the wife again communicated with the husband and, receiving no response, filed her petition for citation. It is readily noted that there was no quid pro quo for any waiver. The accrued payments were vested. No consideration moved from the husband to the wife for their waiver. Indeed it is doubtful that the wife could have waived for the minor any part of the decretal provisions for the minors' support. The arrearages should have been computed without regard to an abortive waiver.

Lastly, we are of the opinion that attorney fees should have been allowed the wife. We understand the reluctance of the court to drain further the resources already too anemic. However, she did and has obtained through the courts more than she was voluntarily receiving. We think the question of attorney fees should be re-appraised.

Accordingly this cause must be reversed and remanded with directions to compute the arrearages as of March 19, 1962, to fix and determine reasonable attorneys fees and to direct their orderly payment in a reasonable manner over a period of time. In all other respects the modifying order shall remain in full force and effect.

Reversed and remanded.

McNeal, P. J., and Dove, J. concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1963

(43 I.A.2 295)

PEOPLE OF THE STATE OF ILLINOIS
EX REL. JAMES V. CUNNINGHAM,
STATE'S ATTORNEY OF PEORIA COUNTY,
ILLINOIS,

Plaintiff-Appellee,

vs.

JAMES LEWIS, ALIAS JOHN DOE, and THE UNKNOWN OWNER OR OWNERS, TENANT OR TENANTS, OCCUPANT OR OCCUPANTS, LESSEE OR LESSEES OF THE PREMISES DESCRIBED AS: All of Lot Three (3) in Block Fifty-four (54) in Ballance's Addition to the City of Peoria, situated in the City of Peoria, County of Peoria and State of Illinois, together with all improvements thereon, and all persons claiming any interest in said premises by virtue of any contract, agreement, assignment, bill of sale, or other conveyance, by James Lewis, individually,

Respondent-Appellant.

Appeal from the Circuit Court, Peoria County.

McNEAL, P. J. -

James Lewis was found guilty of contempt on account of his failure and refusal to comply with orders restraining him from permitting premises to be used for purposes of prostitution, and committed to the common jail for one year by the Circuit Court of Peoria County. On appeal Lewis' theory is that the court erred in denying his motion to vacate one of the restraining orders, and that the Court lacked jurisdiction to adjudge him guilty of contempt, or in the alternative, that he was not proven guilty by a preponderance of the evidence.

In his answer to the petition for rule to show cause why he should not be punished for contempt, defendant Lewis admitted that the Circuit Court of Peoria County had entered three permanent injunction orders against him, viz.: on September 6, 1961, in case 55964 covering property at 610 Southwest Jefferson Street, on September 26, 1961, in case 56180 as to premises at 109 Warner Avenue, and on June 13, 1962,

in case 56641 concerning property at 707 Southwest Jefferson Street, all in Peoria; and that the orders entered in the three cases also perpetually restrained him "from maintaining, operating, controlling or permitting permission for purpose of prostitution, lewd, lascivious conduct or a house of assignation within the jurisdiction" of that Court. Defendant denied that the order entered in case 56641 was properly entered by the court.

The number 56,180 and the legal description of the property involved in that case appear on the covers of the abstract and briefs filed in this appeal. The abstract shows the pleading in 56,180, as follows: a complaint for injunction filed August 10, 1961, an order for a permanent injunction entered on September 26, 1961, a petition for rule to show cause filed on June 6, 1962, defendant's answer to the petition for rule filed on August 22, 1962, the order finding Lewis guilty of contempt and for commitment entered on September 12, 1962, and notice of filing record in this appeal on November 29, 1962.

With reference to 56641, the order for a permanent injunction entered in that case on June 13, 1962, and defendant's motion to vacate that decree appear in the abstract as plaintiff's and defendant's respecti exhibits, offered and admitted without objection at the hearing on the trial court's rule to show cause in 56,180. The abstract fails to show any ruling by the trial court on the motion to vacate, and whether or not the notice of appeal contained any reference to such ruling. Consequently the propriety of the trial court's alleged denial of defendant's motion to vacate the decree in 56641 is not before us for review.

By the decrees entered in September, 1961, Lewis was perpetuall restrained from maintaining, operating, controlling or permitting use of premises for the purpose of prostitution, lewd, lascivious conduct or a house of assignation within the jurisdiction of the court which entered such decrees. The evidence adduced at the hearing on the rule shows that thereafter police officers for the Peoria Police Department

conducted raids at 707 Southwest Jefferson and made arrests as follows: October 27, 1961 - Peggy Doland, Patsy Ford and Penny Scott; November 7 - Patsy Ford, Sherry North, Betty Parker, Betty Wanger, Jackie Wilson and four men including Anthony Yadro; November 10 - Cindy Erickson, Patsy Ford, Ethel Jackson, Mary Jordan, Bobbie Low, Sherry North, Betty Parker, Penny Scott and Betty Wanger; and November 12, 1961 - Gerry Davis, Peggy Doland, Patsy Ford, Ethel Jackson and Pat Wood. Justice of the Peace Lester C. Gerber produced and pointed out entries in his docket showing convictions of a number of those arrested and imposition of fines of $150 to $200 for being inmates or keepers of a disorderly house at 707 Southwest Jefferson. We agree with the statements in appellant's brief that "it cannot be gainsaid that clear and preponderating proof of prostitution at those premises was made by petitioner", and that the testimony elicited by petitioner at the hearing produced "a plethora of evidence showing arrests and convictions for prostitution at the premises known as 707 S.W. Jefferson Street, Peoria, Illinois."

The principal contention on this appeal is that the original complaint in 56641 concerning the premises at 707 Southwest Jefferson, named Catherine McDonaugh as defendant. She answered that on April 17, 1961 she made an agreement to convey the property to James Lewis. He was added as a defendant and served with summons on April 25, 1962. He failed to appear or answer, and a decree was entered against him on June 13, 1962. In his motion to vacate that decree, Lewis claimed that when he executed the agreement, he was acting as an agent or "straw party" for an undisclosed principal.

To support the "straw man" claim at the hearing on the rule, Pam Miller testified in Lewis' behalf, that she resided at the same address in Peoria where he lived, that because she had a bad reputation or "a name for running houses of prostitution", she had an arrangement with Lewi that he would buy 707 Southwest Jefferson in his name as an accommodation to her; and that she furnished the money for the down payment on April 17, 1961, and thereafter rented the place to Ethel LaMar. Sarah Hawk testifie

that she was employed by Ethel LaMar from May 1 until November 10, 1961, to clean up and answer the door at 707, that she knew the place was a house of prostitution and to a certain extent she was in charge of the other girls because Ethel was never there, and that Lewis was never in the premises during her employment. Eloise Colter testified that she worked for Ethel LeMar from the 1st week in May until the 1st week in August, 1961. She worked from six in the evening until six in the morning, six days a week. She was not working as a prostitute, but as a keeper. She answered the door to let the men in. She testified that Sarah Hawk was day keeper of this house of prostitution, and that she never saw James Lewis in or on the premises at any time during the period of her employment. Ethel LeMar and defendant Lewis did not testify at the hearing.

Although the order in 56641 restraining the use of 707 Southwest Jefferson for the purpose of prostitution was not entered against Lewis until June 13, 1962, several months after the use of the premises for prostitution in October and November, 1961, the record in this case shows that the decrees entered by the circuit court against Lewis in September, 1961, in connection with his ownership of two other properties, also perpetually restrained him from permitting the use of any premises for prostitution within the jurisdiction of that court. This provision in these decrees was authorized by section 5 of the Public Nuisances Act (Par. 5, Ch. 100½, Ill. Rev. Stat. 1961), which was designed to prevent an owner or occupant responsible for conducting a nuisance at one location from opening up another nuisance at another place within the jurisdiction of the court. People v. King, 289 Ill. 462; People v. LaPorte, 28 Ill. App. 2d 139, 144.

The record also tends to show that in the suit originally commenced against Catherine McDonaugh concerning the premises at 707 Southwest Jefferson, subsequent developments disclosed that James Lewis had been the equitable owner of the premises since April 17, 1961. It was for the trial judge to determine from all the facts and

circumstances in evidence whether Lewis permitted such premises to be used for prostitution in October and November, 1961, contrary to the restraining orders entered against him in September, 1961, or whether the testimony of Lewis' witnesses sustained his claim that he was merely a "straw man" for Pam Miller.

The trial court was not impressed by Miss Miller's suggestion that Lewis was her accommodating "straw man", and found defendant guilty of contempt. The trial judge heard Lewis' witnesses testify and was in a more advantageous position than we now are to determine the credibility of the witnesses and whether the violation of the injunction orders had been established by a preponderance of the evidence. People v. Buconich, 277 Ill. 290, 295. He had the right to take into consideration the appearance and the demeanor of the witnesses while on the stand. We are not warranted in disturbing his finding unless it is clearly and manifestly against the weight of the evidence. Long v. Long, 15 Ill. App. 2d 276, 282.

We have carefully reviewed the evidence and concluded that under the facts and circumstances shown in this record the trial judge was especially well qualified to determine the credibility of the witnesses who testified in this case and the weight to be given their testimony. His determination of these matters and his conclusion that defendant Lewis was guilty of contempt is not against the manifest weight of the evidence. Accordingly the order and decree of the Circuit Court of Peoria County is affirmed.

Decree affirmed.

Dove, J., and Smith, J., Concur.

General No. 11734 (Abstract Only)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(SECOND DIVISION)

MAY TERM, A. D. 1963

43 I.A.2 296

CARRIE H. MARTIS and DEL F. MARTIS, Plaintiffs-Appellants,	)	Appeal from the
vs.	)	Circuit Court of
ANNA HATZIPANAGIOTIS, Defendant-Appellee.	)	DuPage County

SPIVEY--J.

The Circuit Court of DuPage County entered judgment for the defendant on a jury verdict finding the issues for the defendant and against both plaintiffs. From this judgment and the Court's denial of plaintiffs' post-trial motions plaintiffs appeal.

The complaint in separate counts charges the defendant with (1) negligence which proximately caused the plaintiff Carrie H. Martis' personal injuries, (2) wilful and wanton conduct which proximately caused Carrie H. Martis' injuries, and (3) negligence which proximately caused the plaintiff Del F. Martis' loss of consortium.

Plaintiffs contend the defendant was guilty of either negligence or wilful and wanton conduct as a matter of law, that the court erred in refusing to direct a verdict in favor of the plaintiffs at the close of all of the evidence or ordering judgment notwithstanding the verdict, and erred in denying their motion for a new trial.

The controlling occurrence evidence was offered by Bernice Nash, driver of the automobile in which the plaintiff Carrie Martis was a passenger

and the defendant Anna Hatzipanagiotis. Except for the evidence as to the speed of Mrs. Nash's automobile the evidence is not in dispute. Mrs. Nash stated she was driving thirty miles an hour as she entered the intersection, and the defendant testified Mrs. Nash's speed at that time to be fifty to sixty miles an hour.

Bernice Nash on behalf of the plaintiffs testified she was driving east on Roosevelt Road, a four lane street, shortly after seven o'clock on the evening of November 10, 1958. Her automobile lights were on and the pavement was dry. She was driving in the right hand lane of the two eastbound lanes at a speed of between thirty-five to forty-five miles an hour. She was travelling about thirty miles an hour as she passed under an overpass which is about a block and a half west of Butterfield Road. At that point she saw the traffic control lights at the intersection of Roosevelt Road and Butterfield Road turning red against east and west traffic. She slowed the speed of her car to about twenty miles an hour until she reached a point opposite a used car office (distance from the intersection unknown to the witness) at which point the aforesaid traffic light changed to green.

As she approached Butterfield Road an automobile also eastbound in the inner eastbound lane was driving parallel to her car, turning left at Butterfield Road. A semi trailer was also following her in the outer lane which she observed in her mirror. Before her car crossed the center line of Butterfield Road it collided in the intersection with defendant's automobile. She had not seen the defendant's automobile prior to the instant of the impact. The right front of her car struck the left side of defendant's automobile.

Anna Hatzipanagiotis called by the plaintiff under Section 60 of the Civil Practice Act stated she was driving west on Roosevelt Road in the inner westbound lane as she approached Butterfield Road. She had activated her turn signal lights and was gradually approaching the intersection, where she stopped for a red light. When the light turned to green she allowed two eastbound cars to pass then looked toward the west and observed car lights approaching from that direction at a point about half way to the overpass. She then glanced down for a second to shift her car, started her turn, and again looked to the west and

saw lights very close. Her car was struck when the front wheels of her car were out of the intersection to the south.

At the close of all of the evidence defendant moved for a dismissal of the wilful and wanton count which motion was objected to by plaintiffs and denied by the Court.

Both parties in their briefs agree that the plaintiffs were free of any contributory negligence and any contributory wilful and wanton conduct. This leaves the only question to be resolved is whether as a matter of law the defendant was chargeable with negligence or wilful and wanton conduct which proximately caused the plaintiffs' injuries or damages.

Identical considerations are applicable in determining a party's right to a directed verdict and to a judgment notwithstanding the verdict. (Butler v. O'Brien, 8 Ill. 2d. 203, 133 N.E. 2d. 274; Schiff v. Oak Park Cleaners and Dyers, Inc., 9 Ill. App. 2d. 1, 132 N.E. 2d. 416.)

For th e trial court or this court to say as a matter of law that the defendant was guilty of negligence or wilful and wanton conduct and that said acts or either of them were the proximate cause of plaintiffs' injuries or damages, it must be in a position to conclude that under the evidence all reasonable minds would agree that the defendant was guilty of negligence or wilful and wanton conduct and that such acts proximately caused plaintiffs' injuries or damages. (Piper v. Lamb, 27 Ill. App. 2d. 99, 169 N.E. 2d. 164; Hilbert v. Dougherty, 34 Ill. App. 2d. 174, 180 N.E. 2d. 699.)

This court in quoting from Ney v. Yellow Cab Co., 2 Ill. 2d. 74, 117 N.E. 2d. 74, said in Placher v. Streepy, 19 Ill. App. 2d. 183, 153 N.E. 2d. 369, "Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of a trial by jury is recognized in the Magna Charta, our Declaration of Independence and both our State and Federal Constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law."

In Eggimann v. Wise, 191 N.E. 2d. 425, we said, "On such motion it is not the province of the Court to weigh and determine the preponderance of the

General No. 11748

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(SECOND DIVISION)

MAY TERM, A. D. 1963

(43 I.A.2 297)

In the Matter of the Estate of ADDIE RYDBERG, Deceased.	Appeal from the Probate Court of Winnebago County

SPIVEY--J.

This cause was heard in the Probate Court of Winnebago County where the judgment, in effect, was that a claimant in an estate have judgment for $5,850 for services rendered her deceased mother. An heir appealed from the judgment.

The instant cause is another of the oft-times hardship cases which come to us on review from proceedings in estates. The facts are not complicated nor the law obscure but rather they frequently result in a hardship from the claimant's standpoint.

In the instant case the evidence shows that the claimant faithfully cared for her mother for years and under the most difficult circumstances. The decedent, Addie Rydberg, died at age ninety, a helpless invalid. From 1946 to 1959 Mrs. Rydberg lived with her daughter in her daughter's home. Until 1956 Mrs. Rydberg was able to care for herself and help her daughter. In 1946 when it was decided that Mrs. Rydberg was to come to her daughter's home to live, she agreed to pay $15.00 per month for room and board. This sum was paid and accepted. In 1956 Mrs. Rydberg suffered a stroke which left her helpless to perform even her bodily functions. The claimant from 1956 to 1959 cared for her mother's every need. She also managed her mother's property and financial affairs. Finally it became necessary to place Mrs. Rydberg in a nursing home where she passed away in May of 1960.

After Mrs. Rydberg's death, her daughter filed a claim in the estate for $7,000.00 for personal services, room, board, and nursing care from November 1, 1953, to August 25, 1959, and for supervision and management of property from November 19, 1953, to May 27, 1960. She credited the claim with $4,259, which sum she withheld from funds received on behalf of Mrs. Rydberg and requested an additional $2,741.

The claimant's daughter and brother testified at the hearing. In essence, the daughter related that her grandmother had lived with her mother as we have stated and that her mother cared for Mrs. Rydberg as we have stated. The brother testified that the decedent had told him before she went to live with the claimant that she was to pay $15.00 per month for her room and board. This was the only testimony with reference to the relationship between mother and daughter.

Two witnesses over objections testified as to the reasonable value of nursing care and property management. Exhibits showed receipts signed by the claimant for room and board to August 15, 1954. The court allowed the claim for funds in addition to the $4,259.00 withheld by the claimant in an amount of $1,591.00.

There is no evidence to show an express contract whereby the decedent was to pay other than fifteen dollars per month. This sum was apparently acceptable to both parties prior to Mrs. Rydberg's stroke in 1956. Thereafter there apparently could be no new contract for then Mrs. Rydberg was unable to conduct business and reach an agreement with reference to the price she was to pay for her care.

It cannot be reasonably contended that the contract to pay fifteen dollars per month was in actuality, or evidence of an agreement to pay a reasonable sum for Mrs. Rydberg's care if care became necessary, for the claimant's evidence shows that the fair charge for such care was $150.00 per month. We can only conclude that Mrs. Rydberg and her daughter entered into an express contract for room and board to be furnished at the rate of $15.00 per month, and that there was no agreement to pay for any other services performed. These other services then, must have been performed gratuitously. Heffron v. Brown, 155 Ill. 322, 40 N.E. 583; Miller v. Miller, 16 Ill. 296; Williston on Contracts, Third Edition Section 91 AA.

In Peyton v. McLennan, 129 Ill. App. 654, services were performed in consideration of a promise to leave $200.00 by will to the party performing the services. Thereafterthe claimant sought to recover more than the $200.00 promised. The court stated, "This contention cannot be maintained under the law. When claimant entered

the home of her grandmother and became a member of her household, she, by means of that condition, barred herself from recovering anything for any services she might render thereunder, except upon an express agreement by decedent to pay; and since the evidence is conclusive to the effect that there was an express agreement upon the part of the decedent to pay claimant the sum of $200.00, there can be no implied contract to pay some other or different amount." Laymon v. Estate of Henry Francis, 213 Ill. App. 82.

For these reasons the judgment of the Probate Court of Winnebago County must be reversed and remanded with instructions to enter judgment for the claimant and against the estate for room and board at the rate of $15.00 per month, according to the contract and for the claimant to refund to the estate all sums withheld in excess of that which the evidence shows the claimant to be entitled.

The appellant seeks the imposition of his attorneys fees incurred in this appeal to protect the assets of the estate. He has cited no authority whereby we may award him attorneys' fees and this request is denied.

Judgment reversed and remanded with directions.

Crow, P.J. and Wright, J. Concur

Gen. No. 11750 Agenda 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
MAY TERM, A.D. 1963

43 I.A.2d 298

P. J. BRODERICK, LOYDE HAAS and WILLIAM J. DAVIS, Plaintiffs-Appellants, vs. THE COUNTY OF CARROLL, WILLIAM GEISZ, ALLEN AIRHART, JEAN AIRHART, and THE DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS, Defendants-Appellees.	Appeal from the Circuit Court of Carroll County.

CROW, P. J.

This is an appeal from a judgment dismissing a complaint and cause of action for declaratory judgment and injunction. The complaint, so far as relevant, alleged that the plaintiffs, P. J. Broderick, Loyde Haas, and William J. Davis, are the owners of farm land totalling over 1200 acres lying along a township road commonly called Olive School Road in Woodland Township, Carroll County, near its intersection with County Highway No. 10, also known as FAS, Route 1068; the County of Carroll embarked upon the improvement of County Highway No. 10 and as a result the County Road at the point where the same is met by the Olive School Road was relocated and straightened substantially as set forth in an attached drawing, Exhibit A; the right of way required for the newly located road at that point was acquired by a dedication of May 10, 1960 from the defendants Allen Airhart and Jean Airhart, filed and recorded October 13, 1960, and refiled and recorded on

October 3, 1961, with the following added after the legal description of the property conveyed: "Also one leg of road approach to Olive School Road will be vacated on construction of new road."; the improvement of the County Road has been substantially completed, but no work has been done to construct the more southerly access to the County Road as shown in Exhibit "A", but that means of access has been blocked off; the purported agreement made with the defendants Allen Airhart and Jean Airhart to close the one leg of the road approach to Olive School Road was not made at the time the right of way was dedicated and is without consideration; its terms are vague, indefinite, and uncertain; the agreement is without authority and beyond the powers of the County, the Highway Commissioner, or any Committee of the Board of Supervisors, and is void and unenforcible; neither the County of Carroll nor William Giesz, County Superintendent of Highways, has any authority to close the road in question or block the access therefrom to the new County Road; the main trading area of the plaintiffs and others living along Olive School Road is in the City of Mount Carroll, and the access to the new County Road as presently constructed is inconvenient, circuitous and hazardous in traveling to and from Mount Carroll. The complaint prayed for a declaration that the agreement was void, that the County had no authority to close the road, and for an injunction against performance of the agreement and closing of the road or blocking access therefrom to the new County Road, and for a mandatory injunction to construct an adequate approach to the new County Road.

Motions of various of the defendants, Geisz, Allen Airhart and Jean Airhart, to dismiss the complaint were filed, and later also by The County of Carroll. Those motions were denied in part and allowed in part. The plaintiffs were granted leave to amend

the complaint, which they did, and answers were filed by the defendants the Airharts, The County of Carroll, and Geisz. A motion for Summary Judgment was filed by the plaintiffs based on the pleadings, which was denied. There were also a notice by the plaintiffs to admit facts, interrogatories by the plaintiffs, and answers thereto, which need not be referred to in detail in view of the disposition we believe must be made of the appeal. Motions were again made by the defendants County of Carroll, William Geisz, and Allen Airhart and Jean Airhart, to dismiss the complaint, for the reasons designated in the previous motions to dismiss and for the further reason that the complaint as amended did not state a cause of action and the court is without authority to enter any order thereon. The motions of the various defendants urged that the Court did not have jurisdiction of all the necessary parties to the cause, the plaintiffs have not made parties to the suit all the necessary parties, and other points. The motions to dismiss the amended complaint were allowed, the plaintiffs apparently declined further to amend, and the complaint and suit were dismissed by a final judgment. The plaintiffs do not appear to have objected procedurally to the filing, consideration, and determination of the defendants' further motions to dismiss while their answers were still pending, and the final judgment order entered on the motions appears to be initialled by one of the plaintiffs' attorneys, indicating, presumably, an approval as to form.

It is apparent from the pleadings, including Exhibit A attached to the complaint, that the plaintiffs are property owners whose farms are adjacent to the Olive School Road, a township highway, at points to the west of and beyond the former "T" intersection where that road coming from the northwest joined the former Carroll County Highway No. 10, which then made a right angle

turn to the northeast and southeast from the intersection. The County relocated County Highway No. 10 at this point by a gradual curve northeast and southeast and at a higher elevation. The defendants Airhart owned the property in the northeast quadrant between the northeast "leg" and southeast "leg" of the old County Road No. 10. Their residence is in that quadrant near the former angle of the old County Road No. 10. The right of way for the new relocated gradual curve had to come from them. The curve was to lie northeast of their residence. If the former northeast and southeast "legs" of the old County Road No. 10 which lay northwest and southeast of their residence remained available and usable after the new relocated gradual curve then their residence would have been completely surrounded by the new gradual curve and the northeast and southeast legs of the old County Road No. 10. In connection with procuring the right of way for the new relocated curve the County agreed to abandon and close the southeast "leg" of the old County Road No. 10, leaving unchanged the northeast "leg" of the old County Road No. 10. The plaintiffs insist here on their alleged absolute right to travel upon the abandoned and closed so called "south leg" of County Highway No. 10 directly to and from the relocated county Highway No. 10 and the trading center at Mt. Carroll.

The issues are:

(a) Whether all necessary parties were before the Court, including (but not limited to) whether, in the absence of any allegation of special damage or injury of a different nature than that sustained by the public generally, the plaintiffs-appellants are competent to maintain this suit in their individual capacities, - the defendants' theory is that they are not;

(b) Whether the agreement between the County and the abutting owners Airhart was valid, and thereby extinguished the former public easement for travel upon the "south leg" of the relocated "T" intersection, - the defendants' theory is that it was valid; and

(c) Whether the County Board had the statutory power, - within a reasonable exercise of its discretion, - to abandon and close the "south leg", in the interest of the traveling public upon this intercounty secondary highway, even though the plaintiffs-appellants and others traveling upon the intersecting township highway, the Olive School Road, were thereby subjected to some inconvenience and circuity in not being able to travel directly southeast along the abandoned and closed "south leg", and (necessarily) up a 30% grade to intersect with the relocated County Highway No. 10 on a curve, - the defendants' theory is that the County Board had such power.

The plaintiffs' theory is that the complaint states a good cause of action, an agreement to close a public road is void, a County has no authority to permanently close a road, and all material facts alleged being admitted the relief prayed should be granted.

As the Supreme Court said in HARTSHORN v. BIERBOM et al. (1924) 312 Ill. 275, we come first to the question of whether or not the plaintiffs-appellants have a right to bring this suit so far as this complaint is concerned.

The complaint states that the plaintiffs are the owners of farm land totalling over 1200 acres lying along a township road commonly called Olive School Road in Woodland Township, Carroll County, near its intersection with County Road No. 10 also known as FAS, Route 1068. The plaintiffs' land is not alleged to be

adjoining and abutting the abandoned part of County Road No. 10, the old southeast leg or part thereof extending southeast from the former "T" intersection. The only damage claimed by the plaintiffs in their pleading is that the access to the new County Road as presently constructed is inconvenient, circuitous and hazardous to the plaintiffs in traveling to and from Mt. Carroll.

It may be observed that the northeast "leg" or part of the old County Road No. 10 extending northeasterly from the former "T" intersection has not been abandoned but remains available and usable and the plaintiffs can by traversing it get on to the relocated County Road No. 10. Apparently the only thing the plaintiffs cannot now do is use the abandoned southeast "leg" or part of the old County Road No. 10 extending southeastwardly from the former "T" intersection to get on to the relocated County Road No. 10. The difference to the plaintiffs in using the northeast "leg" to get on County Road No. 10 as relocated instead of the abandoned southeast leg is evidently very small in distance. Two more angular turns would be involved, but that appears to be about all the difference, and they would have had to traverse one of those turns anyway even if the road had not been relocated at this point if they were proceeding to or from a northeasterly direction on County Highway No. 10.

There is no showing in the complaint as amended of any special damages to the plaintiffs other than what may be common to other citizens and taxpayers of the vicinity desiring to use the abandoned southeast leg of the old County Road No. 10. We think that the rule of law as set forth in HARTSHORN v. BIERBOM et al. applies. The Court said there, p. 282-283:

"The rule is that where parties do not own any land over which a vacated highway passes or which abuts upon such highway and are not parties to the proceedings to vacate the same, they have only such interest as is possessed by all other members of the public residing in the vicinity, and cannot, in their personal or individual capacities, be permitted to maintain an action attacking the record of the corporate authorities vacating the road. (PEOPLE v. COMMISSIONERS OF HIGHWAYS, 240 Ill. 399; PEOPLE v. COUNTY OF VERMILION, 210 id. 209.) In WINNE v. PEOPLE, 177 Ill. 268, mandamus was brought to compel the board of supervisors to grant the prayer of a petition for a division of a township in DeKalb County and the creation of a new town. It was there held that as it did not appear that the relator had such interest in the subject matter of the suit as to entitle him to prosecute a petition for mandamus, the writ should be dismissed on that ground. In HAMILTON v. SEMET SOLVAY CO. 227 Ill. 501, it was held that a court of equity will not enjoin the obstruction of a street on suit by an individual unless such obstruction works a special injury to the complainant. To the same effect is GUTTERY v. GLENN, 201 Ill. 275. In CITY OF CHICAGO v. UNION BUILDING ASS'N. 102 Ill. 379, it was held that the owner of property located some distance from a street proposed to be vacated cannot maintain a bill to enjoin the city and its authorities from vacating such street where it does not appear that he will suffer some special injury different from that of the public generally though in a greater degree."

And see: PARKER v. CATHOLIC BISHOP et al. (1898) 146 Ill. 158.

This action was not brought by the People but by named individuals, and we believe the Trial Court was not in error in dismissing the suit for lack of capacity in them to maintain the suit and for failure to state a cause of action. The plaintiffs do not own any land over which the abandoned southeast "leg" of the old County Highway No. 10 passes or which abuts upon that "leg". They have only such interest as is possessed by all other members of the public residing in the vicinity. They cannot, in their individual capacities, maintain an action attacking the abandonment concerned. The complaint as amended states no cause of action in these plaintiffs. Special injury is the gist of the action where

brought by an individual and not by the People. No such special injury is alleged.

With this view, it is unnecessary to consider or decide any other questions. The judgment will be affirmed.

During the pendency of the appeal the defendants-appellees Airhart filed a motion to transfer the appeal to the Supreme Court, to which the defendants-appellees The County of Carroll and Geisz assented, and to which the plaintiffs-appellants objected. Also during the pendency of the appeal all the defendants-appellees filed a motion to strike the reply brief of the plaintiffs-appellants or for leave to file an answering brief to new matter alleged therein, to which the plaintiffs-appellants objected. The motions were taken with the case, and are hereby denied.

AFFIRMED.

MOTIONS DENIED.

Spivey,, J., and Wright, J., Concur

Abstract

General No. 11762 (Abstract Only)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(SECOND DIVISION)

MAY TERM, A. D. 1963

43 I.A.2 299

HARRY CARR, Plaintiff-Appellee, vs. ROBERT B. CARR, as Special Administrator, Defendant-Appellant.	)	Appeal from the Probate Court of Winnebago County

SPIVEY--J.

The County Court of Winnebago County found in favor of Harry Carr on a claim against the estate of Vern Carr. The Claim was allowed to the extent of $2495.00 and disallowed as to the sum of $2454.43. It was contended that Harry Carr performed services for his father, Vern Carr, and that there was an implied agreement between father and son that the father would pay the son for the services performed. Another son, Robert, as special administrator, appealed from the order allowing any part of the claims.

Harry Carr rented his father's farm and farmed another farm adjoining on the west. Harry had worked with his father for 22 years and leased his father's farm from year to year commencing in 1955. The claim presented by Harry was for services performed by him from 1956 up to the time of Vern's death, and covered a wide range of work. There seems to be no question but that Harry did lawn work, fence repair, farm work, cared for his father's home and pets while his father was gone from the farm for the winter and made certain expenditures for power bills. It is conceded by the claimant that Vern was business-like in his habits and the claimant introduced evidence that father and son had regularly adjusted their accounts during the period of time covered by the claim. The claim was presented on the last day for

filing claims, and there was no evidence of the presentation of any claim during the life of the decedent.

The claimant's son, hired man and neighbor testified for the claimant as did a fertilizer dealer. In substance, the son testified that certain work was performed and that utility bills were paid by his father. However, there was no testimony as to any amount of money paid for bills or no testimony as to the amount or value of the services performed.

The claimant's hired man told of work that he had done on Vern's farm home and described farm work he had performed on Vern's farm. He said that Harry paid him. He also testified that when he and Vern were in the timber cutting wood, Vern said he was going to have to pay Harry some day for the work Harry had done and for the wages Harry had paid the hired man. The fertilizer dealer testified that he sold fertilizer to Harry that was put on Vern's farm. He admitted on cross examination that Harry received a credit of $1.10 per ton for fertilizer applied to Vern's farm from the Department of Agriculture.

Lester Simmons, a neighbor, testified that Harry looked after his father's farm while his father was away. He also stated that in 1960 the farm was put in the soil bank and had to be plowed and sowed to grass and the grass mowed the first year. Simmons said that Harry did the work. He estimated that 130-135 acres were seeded and testified as to its reasonable value for the services. None of the witnesses knew whether or not Harry was paid by Vern for the work done.

This is in substance all of the evidence in its form most favorable to the claimant.

Claimant's theory is "The evidence supports an implied contract for work done by Harry Carr on his father's farm and for materials furnished to his father."

We are unable to agree with this contention.

In Illinois, as in most jurisdictions, there is a presumption that services performed by a close relative are gratuitously performed. (Heffron v. Brown, 155 Ill. 322, 40 N.E. 583, and Miller v. Miller, 16 Ill. 296.) This presumption may be overcome by proof of an express or implied contract. Here it is conceded by the claimant that there was no express contract. Thus, the order allowing the claim must find support, if at all, by proof of a contract implied by facts and circumstances.

"The inference that services are to be paid for at their reasonable or fair value where no price has been stipulated is not usually drawn where these services are rendered to a member of the family circle by another member of the same household or close relative." Williston on Contracts, Third Edition, Section 91AA.

In Neish v. Gannon, 198 Ill. 219, 64 N.E. 1000, the Supreme Court said that the presumption that services were gratuitously performed is rebutted where the evidence shows that at the time the services were performed, both parties understood and expected that the party performing the services was to be compensated therefor. We followed this rule in Rush v. Estate of Rush, 27 Ill. App. 2nd 242, 169 N.E. 2nd 538.

In the instant case there is some evidence that (in 1961) or (at sometime) the decedent stated his intention to pay Harry "some day." However, this intention was not shown to have ever been communicated to Harry, nor was there any evidence that Harry intended to charge for his services when the services were performed nor is there any evidence that he communicated to Vern his intention to charge. Absent evidence of this nature, the claim must fail.

In those cases cited by the claimant where an implied contract was found, there was evidence of conversations between the parties to the contract evidencing the intention of each that a person performing the services was to be compensated. There is no such evidence in this case.

Because of the failure of the claimant to show by any evidence that when the services were performed both parties contemplated that a charge would be made and paid, the claimant failed to prove his claim and the County Court of Winnebago County erred in allowing any part of the Claim of Harry Carr. We need not consider the other points raised by the special administrator in opposition to the claim.

The judgment of the County Court of Winnebago County allowing the claim of Harry Carr in the amount of $2495.00 is reversed.

Judgment reversed.

Crow, P. J. and Wright, J. concur

49028

FRED WRIGHT, by his Administrator AGNES WRIGHT,

Plaintiff-Appellant,

v.

CHICAGO TRANSIT AUTHORITY,

Defendant-Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

A complaint asking judgment for personal injuries to the decedent caused by the alleged negligence of the defendant was filed on January 25, 1955. The defendant answered. When the cause came on for trial on September 19, 1962, it was dismissed for want of prosecution. On September 24, 1962, the court denied plaintiff's motion, filed that day, to vacate the order of dismissal and to reinstate the cause. Plaintiff appeals.

We do not deem it necessary to discuss the case at length as the defendant has failed to file a brief as required by Rule 7 of this court. See Standley v. Standley, 143 Ill. App. 278.

Plaintiff presented his motion to vacate within 5 days after the dismissal. At the time of the dismissal the case had been awaiting disposition for 7 years. Under Sec. 24a of the Limitations Act (Ill. Rev. Stat. 1961, Chap. 83), a plaintiff who has suffered an involuntary dismissal is given a year to file a new action without regard to whether the dismissal was due to negligence. Sec. 46 of the Civil Practice Act permits joinder of a defendant, after the tolling of the Statute of Limitations where "inadvertence" is present and the requirements of the Section are met. The order denying the motion to vacate is reversed and the cause is remanded with directions to allow the motion and to restore the cause to

the trial calendar.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and BRYANT, J., concur.